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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-____

CHURCH OF SCIENTOLOGY MISSION OF DAVIS; and MARTIN SAMUELS,

Petitioners,

—v.—

JULIE CHRISTOFFERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

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December 1982

QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a court from considering or deciding a lawsuit brought against a church by a former member of that church alleging that representations made to the former member by church staff members concerning religious practices and beliefs of the church were fraudulent?

2. Whether a jury may consider the truth or falsity of representations about religious practices and beliefs of a church if the jury first finds that the person making the representations did so for the purpose of raising money for the church, or for what the Court of Appeals of Oregon denominated a "wholly secular purpose"?

3. Whether the First Amendment prohibits a court from imposing punitive damages upon a church for the allegedly fraudulent representations of a staff member concerning the religious practices and doctrine of the church?

4. Whether the First Amendment prohibits a court from imposing damages upon a church for the purportedly fraudulent representations of a staff member concerning the religious practices and doctrine of the church, where the staff member's alleged denial of the religious character of the practices and representations was contrary to the official written policy, rules and regulations of the church as understood and accepted by the membership?

5. Whether a church may be required to carry the burden of proving the religious character and purpose of a staff member's representations about the church's religious practices and doctrines as a prerequisite to asserting that the First Amendment prohibits inquiry into the truth or falsity of the statements?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings in the Court of Appeals of Oregon were:

The Church of Scientology Mission of Davis; Martin Samuels; The Church of Scientology of Portland; the Delphian Foundation; and Dennis Patton,

Appellants,

and

Julie Christofferson,

Appellee.

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JULIE CHRISTOFFERSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The Church of Scientology Mission of Davis ("Mission") and Martin Samuels petition that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon insofar as that judgment remanded the case to the Oregon Circuit Court, Multnomah County, for a new trial on respondent's claim that the representations of mission staff members about the value of Scientology's religious practices were fraudulent.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals of the State of Oregon (App. A, A1-A51)[1] is reported at 57 Or. App. 203, and at 644 P.2d 277. There are no other opinions.

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1 References to "(A ____)" are to pages in Appendix A to the petition, *post*. References to "App. B", "App. C", "App. D", and "App. E" are to appendices B, C, D, and E, *post*.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered on May 3, 1982 (A1). Both petitioners and respondent filed petitions for rehearing with the Oregon Court of Appeals, which were denied on June 10, 1982 (App. B); petitions for review with the Supreme Court of the State of Oregon, which were denied on July 27, 1982 (App. C); and motions for reconsideration of the denials of review with the Supreme Court of the State of Oregon, which were denied on September 21, 1982 (App. D). This petition is being filed within ninety days of the denial by the Oregon Supreme Court of the motions for reconsideration of the denial of the petitions for review. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in relevant part:

> . . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case involves a dispute between an ex-member of a religious movement and her former church concerning matters of religious doctrine and practice.

1. Petitioner Church of Scientology Mission of Davis (Mission) is a non-profit religious institution (A2, A38) incorporated in California in 1972. Petitioner Martin Samuels is an ordained minister in Scientology and President of the Mission (A2). The Court of Appeals of Oregon recognized that "Scientology is a religion and . . . the Mission is a religious organization entitled to invoke the protection of the Free Exercise Clause" (A38).[2]

Respondent Julie Christofferson is a former member of the Mission. After graduating from high school, she moved to Portland, Oregon in 1975 to be with her boyfriend who already was a member. At his suggestion, on July 13, 1975, she joined the Mission and enrolled in a communications course offered by the Mission (A5). For the next several months, Christofferson participated in religious courses and services offered by the Mission, including the central religious practice of auditing (A5).[3] During this time, respondent lived with friends and held a full-time job (A2).

At the time respondent joined the Mission and enrolled in the communications course, she was told and understood that the religious training programs of the Church were offered only to Church members (A40; Tr. 410, 412).[4] She read the

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2 *Accord, Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969); *Barr* v. *Weise*, 412 F.2d 338 (2d Cir. 1969); *Church of Scientology* v. *Siegelman*, 475 F. Supp. 950, 954 (S.D.N.Y. 1979). The nature of Scientology beliefs and practices is described in the Court of Appeals opinion (A2-A4).

3 The Court of Appeals found that the courses and services offered by the Mission were religious in nature (A39).

4 References to "Tr." are to pages in the trial transcript.

rules and regulations of church membership and agreed to them by her signature. Those rules and regulations emphasized the religious nature of Scientology, the courses, and the practice of auditing. They stated, in part:

> Scientology . . . is a spiritual and religious guide . . . Dianetics is practiced in the Church of Scientology as pastoral counselling, addressing the Spirit in relation to his own body and intended to increase well-being and peace of mind . . . Auditing is a pastoral counselling procedure by which an individual is helped, in stages, to recover his self-determination, ability and awareness of self, restoring respect for self and others . . . Scientology is an applied religious philosophy. . . The results claimed and benefits obtainable from auditing and training . . . are personal and are experienced by the individual himself or herself . . . The Church delivers auditing and training solely on the understandings contained in this booklet, and you are required to have carefully read and digested them before commencing any course or counselling.

C. A. App. 191-198.[5]

Respondent's membership application also emphasized the religious nature of Scientology beliefs and practices. It read:

> I, *Julie May Christofferson,* of *Eureka, Montana,* apply to the Church of Scientology for membership. I am willing to subscribe to the creed of the Church of Scientology, which is to assist the individual to become more aware of himself as an immortal being and to help him achieve the basic truths with regard to himself, his relationship to the physical universe and the Supreme Being, and to create, here on earth, a civilization of which all can be proud.

C.A. App. 199.

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5 References to "C. A. App. ____" are to pages in the Appellants' Appendix in the Court of Appeals of Oregon.

The respondent testified at trial that despite these unequivocal official written statements of the Mission as to the religious nature of Scientology and its practices, several weeks *after* she joined the Mission and began participating in its courses and practices, a staff member of the Mission told her that Scientology was not religious in nature, but claimed to be such for public relations reasons (Tr. 386).

In September 1975, plaintiff applied to become a provisional staff member at the Delphian Foundation, a non-profit educational institution founded by the Church of Scientology (A5). She began work there in early October, but was asked to leave in the beginning of December until and unless she could convince her mother to stop opposing her involvement in Scientology (*id.*).

Respondent went home to Montana for Christmas, but the visit ended with a quarrel with her mother. She returned to Portland in January 1976, but was not permitted to participate in courses or programs at the Mission. She returned home in April 1976 to try to convince her parents to accept her involvement with Scientology. When she returned home, her parents locked her in the house and forcibly "deprogrammed" her (*id.*).

2. One year later, respondent brought this action against eight defendants, including the petitioners.

Her seventh amended complaint, upon which the case was tried, alleged three causes of action: unlawful trade practices, fraud, and outrageous conduct. Both the unlawful trade practices and fraud causes of action were founded principally upon representations allegedly made by staff members of the Mission concerning the benefits of Scientology practices and courses. For example, staff members allegedly told Christofferson that auditing would develop creativity, enhance intelligence quotient, and allow one to control her emotions, neuroses, and psychosomatic ills. Other alleged representations concerned purported curative effects of auditing upon physical illness, the efficacy of the communications course with respect to study habits and the background of L. Ron Hubbard, the founder and spiritual leader of Scientology. Respondent alleged

that all the representations were false and fraudulent (A24-A26).

Respondent's third cause of action was for outrageous conduct. She alleged that the defendants attempted to brainwash her into service to them, and harassed her after she had been deprogrammed (A9, A21).

Prior to trial, defendants moved to dismiss and for summary judgment on the grounds, *inter alia,* that the First Amendment prohibited judicial inquiry into a dispute between a church and an ex-member on matters of religious belief and practice, particularly where the resolution of the dispute would require the court to decide the truth or falsity of religious doctrine. The motions were denied without opinion. Also denied were motions by the defendants to strike all claims based upon representations concerning religious practices and beliefs, and demands for punitive damages. Since Oregon law authorizes a plaintiff seeking punitive damages to present evidence of the financial status of the defendants, the trial court permitted extensive discovery of the finances of the Church and the Mission.

The trial proceeded against five defendants, including the petitioners, the Delphian Foundation, the Church of Scientology of Portland (COSOP), a separately incorporated religious organization with which plaintiff had had no significant contacts, and Dennis Patton, a staff member of the Mission.

At the trial, respondent presented no evidence that the defendants used force or the threat of force to induce her membership or participation in Scientology. Nevertheless, the respondent's attorney was permitted to refer repeatedly to Scientology as a "destructive cult" and to draw out of his witnesses comparisons of Scientology with North Korean torturers of American prisoners of war, the People's Temple, and various other controversial or unpopular religious organizations. In his final argument, respondent's counsel told the jury over objection:

> They made her into a totally different person, totally obedient and subservient. Just like they have proudly with ten thousand other young people in Oregon. . . . They do it today, they did it last night, they are going to do it

> tomorrow. Ten thousand people have been tricked, lied to and deceived by this religion. These people have come like locusts from Davis, California . . .
>
> * * *
>
> Why are they doing this? Why is the City being subjected to this?
>
> Why has this State been taken over? . . .
>
> * * *
>
> You can read . . . all of these exhibits. You can read every one and you will not find a doctrine of love or charity. You will not find sympathy to the Good Samaritan. You won't find trust, morality. You won't find words of sharing and loving in any type of language that you can understand or anyone else can understand. They did this to Julie. They have done this to others. And they are going to do it. They are going to change our city and our state. . . . Only you have the power to stop this type of conduct.

Tr. 3344.

The jury returned a verdict of $2,067,000.20 on the fraud and outrageous conduct causes of action against the petitioners, Delphian, and COSOP. Of that amount, $3,000.20 constituted compensatory damages for out-of-pocket expenses, $150,000 constituted compensatory damages for mental distress, and $1,914,000 constituted punitive damages.

3. The Oregon Court of Appeals reversed the judgment. It held as a matter of state law that the conduct of the defendants was not actionable as outrageous conduct, and that the defendants' motion for directed verdicts on that cause of action should have been granted (A9, A21, A24).

With respect to the fraud cause of action, the Court of Appeals held that there was insufficient evidence to hold the Church of Scientology of Portland and the Delphian Foundation liable (A28, A31), but remanded for a new trial against the petitioners. In addressing the petitioners' First Amendment defenses to the fraud allegation, the Court of Appeals held that Scientology is a religion and that the Mission is a religious

organization entitled to invoke the protection of the Free Exercise Clause (A38). It further held that the courses and auditing in which respondent participated and about which the alleged false representations were made were part of the religious beliefs and practices of Scientology (A39).

Despite these findings, however, the Court of Appeals held that representations about the efficacy of the religious courses and auditing of Scientology could lose their religious character and be the basis of a civil action for fraud against the defendant Mission if the persons making the representations denied their religious character and made the representations "for a wholly secular purpose." The court further held that determination of the questions of subjective purpose and thus religious character of the representations was properly one for the jury, that the Mission carried the burden of proving the religious purpose and character of the representations, and that if the jury found a secular purpose it could go on to find that the representations themselves were false and fraudulent. Finally, the court defined a secular purpose as any purpose other than to induce a person to join a church or participate in its practices, and gave as an example of such a secular purpose an intent to raise money for the church.

The Court of Appeals reversed the judgment for the respondent on the fraud cause of action, however, on two grounds. It held that the trial court had improperly instructed the jury to consider the sincerity of the Mission in making the representations, rather than the purpose of such representations (A44), and to determine whether each individual representation, standing alone, was protected as religious. Having found that the jury was improperly instructed in these two respects, the Court of Appeals remanded for a new trial consistent with its opinion.

The Court of Appeals also rejected the petitioners' argument that it was improper to impose punitive damages against a church for the allegedly fraudulent representations of church staff members (A49-51). The Court of Appeals failed to address explicitly petitioners' argument that the Mission could not be held liable at all on a *respondeat superior* basis for such statements by staff members.

REASONS FOR GRANTING THE WRIT

1. This case raises substantial questions under the First Amendment as to whether and to what extent the courts may hear and decide a case brought against a church by a former member alleging that the church's representations about its religious practices are fraudulent and that the church's non-coercive religious practices[6] are tortious. In holding that such allegations raise triable questions upon which juries can award compensatory and punitive damages, the Oregon Court of Appeals has severely undermined the critical "wall of separation between church and state," *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1946), which this Court and other courts have erected for over a century to ensure the public's right to freedom of religious exercise and speech. *See Watson* v. *Jones*, 13 Wall. (80 U.S.) 679 (1872);[7] *United States* v. *Ballard*, 322 U.S. 78 (1944); *Founding Church of Scientology* v. *United States*, 409 F. 2d 1146 (D.C. Cir. 1969);[8] Tribe, *American Constitutional Law*, ¶ 14-12, at 865-880.

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6 By "non-coercive religious practices" petitioners mean religious practices, such as those which existed in this case, about which there is no claim that the religious organization utilized force, the threat of force, or other physical or chemical means to induce the parishioner to join the organization, participate in its practices or services, or remain a member or participant.

7 [T]he judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals.

Watson v. Jones, 13 Wall. at 731, quoting from *Ferraria* v. *Vasconcelles*, 23 Ill. 456.

8 [U]nder *Ballard* it seems unlikely that a disgruntled former adherent could sue a church for fraud and deceit because it had collected money from him on the basis of allegedly "false" doctrines concerning salvation, heaven and hell—or for that matter on the basis of doctrines, such as those of the Christian Scientists, concerning the cause and cure of disease.

409 F.2d at 1156, n. 32.

The questions have assumed great national and constitutional importance at the present time not only because of the fundamental nature of the rights of religious free exercise involved, but also because this particular case has served as a model for the institution of scores of damage actions brought throughout the country against newer or controversial religions by disaffected members of such churches.[9] Following the two million dollar punitive damage award in this case, personal injury lawyers, sensing a new "target" defendant, instituted over twenty-five similar damage claims against the Church of Scientology alone, including a class action lawsuit seeking attachment of the property of various Scientology churches and the appointment of a court receiver to administer the Church.[10] Similar lawsuits were also brought in volume against other churches, including the Unification Church,[11] the International Society for Krishna Consciousness,[12] and even the Catholic Church, and various Protestant sects.

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9 We set forth in Appendix E to this petition a table listing recent cases brought against religious organizations by former members alleging fraud, brainwashing, or mind control. The table lists the name of the case, the nature of the allegations, and the present status of the case and judicial disposition, if any, of the religious free exercise issues raised in the present petition.

10 *Van Schaick* v. *Church of Scientology of California, et al.*, 535 F. Supp. 1125 (D. Mass 1982). The district court has dismissed the class action allegations and denied requests for attachment and appointment of a receiver.

11 Various courts have recognized "that the Unification Church has religion as its primary purpose", *Holy Spirit Association for the Unification of World Christianity* v. *New York State Tax Commission*, 55 N.Y.2d 512, 518-519 (1982), and that " . . . the Unification Church by any historical analogy, philosophical analysis or judicial precedent . . . must be recognized as a bona fide religion." *Unification Church* v. *Immigration and Naturalization Service*, ___ F. Supp. ___, Civil Action No. 81-1073 (D.D.C. September 16, 1982), slip op. at 10. *See also*, *Ward* v. *Connor*, 657 F.2d 45 (4th Cir. 1981); *Troyer* v. *Town of Babylon*, 483 F. Supp. 1135, 1137 (E.D.N.Y. 1981)(Weinstein, J.).

12 The Krishna Consciousness movement has been recognized as a religion under the First Amendment. *International Society for Krishna Consciouness* v. *Barber*, 650 F.2d 430 (2d Cir. 1981).

Central to the complaints in this veritable flood of post-*Christofferson* religious fraud litigation are allegations virtually identical to those made in the present case: that representations about the religious practices and beliefs of the churches were false and are actionable because they were made for the purpose of obtaining funds for the church, and/or that the practices of the churches are outrageous and tortious because they constitute mind control, brainwashing, and the like.

Neither the Oregon Court of Appeals in this case, nor the other state and federal courts before whom the post-*Christofferson* cases have been filed, have properly analyzed or applied the critical First Amendment doctrine which must prohibit such litigation, absent claims of the use of physical force such as kidnapping or battery.[13] The opinion of the Oregon Court of Appeals in this case, while properly recognizing the religious status of the defendants and their religious practices, nevertheless substantially encourages such litigation by permitting inquiry into the truth or falsity of statements about religious practices based upon a secular purpose of a speaker, and by permitting damages, including punitive damages, to be awarded against a church for the unauthorized speech of staff members. In fact, the opinion of the Oregon Court of Appeals is so self-contradictory and ambiguous on the questions of good faith, religious context, and secular purpose[14] that both

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13 In fact, one court has just dismissed a religious fraud case precisely on the grounds urged in the text. *Eden* v. *Moon, et al.*, Circuit Court of Wayne County, Michigan, Case No. 77-736880-NO (December 3, 1982)(unreported oral decision of Judge Sharon Tevis Finch). Judge Finch's opinion hardly provides the definitive ruling necessary to put an end to the tide of religious fraud litigation.

14 On the one hand, the Oregon Court of Appeals quite properly held that the jury may not inquire into the good faith or sincerity of an entire church (A44, 45), distinguishing this case from cases in which the sincerity of the claims of religious beliefs of an individual are relevant. The Court of Appeals noted the conceptual and practical difficulties of an inquiry into corporate sincerity (A44):

the plaintiff and the defendants unsuccessfully petitioned that court for reconsideration so that it could clarify its opinion on those questions. The federal district court in Massachusetts addressed similar issues in *Van Schaick* v. *Church of Scientology of California*, 535 F. Supp. 1125 (D. Mass. 1982), but it, too, left open more questions than it answered.[15] And the

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> In the situation presented here, it is difficult to determine whose sincerity or good faith the jury could be asked to determine. Is the religious organization to be held liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?

The Court of Appeals then turned around and sanctioned just such an inquiry, however, by its discussion of religious context and purpose. It noted that in order to claim First Amendment protection, a religious organization must give notice that it claims to be religious. The Court of Appeals held that representations about religious practices would not be entitled to constitutional protection if they were made on a "wholly secular basis" (A42). The Court then applied a subjective test to determine the question of religious context, *i.e.*, "whether the statements were made for a wholly non-religious *purpose*." The Court did not explain how its "purpose" test would avoid the same infirmities as would the "sincerity" test it rejected, *i.e.*, whose "purpose" the jury could be asked to determine.

A similar anomaly exists with respect to the Court of Appeals' application of its "wholly secular purpose" test. The Court held that:

> A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were made for a purpose other than inducing plaintiff to join or participate in defendants' religion.

(A45). Yet, the plaintiff's entire case was dedicated to proving precisely that the purpose of the representations was to induce the plaintiff to join the Mission and participate in its religious training and practices. The Oregon Court of Appeals nevertheless remanded for a new trial.

15 In *Van Schaick*, District Judge Garrity also struggled with the question of the context in which representations about religious practices are made. Since he was deciding a motion to dismiss, Judge Garrity was required to take as true allegations of a complaint that auditing was held out to Van Schaick as a purely scientific process with no religious overtones. Judge Garrity expressed skepticism about the allegations of the complaint, and suggested that the religious fraud issues be raised in a motion for summary judgment, which the Church of Scientology subsequently filed. Immediately after the motion was argued, the plaintiff voluntarily dismissed the religious fraud allegations.

dangers of the present state of undefined judicial standards were demonstrated in the recent case of *Colombrito* v. *Kelly*, ____ F. Supp. ____, 79 Civ. 6205 (RO) (S.D.N.Y. 1982), in which a federal district court in a private damages action undertook its own broad inquiry into the religious *bona fides* of the Unification Church by requiring the testimony of Reverend Sun Myung Moon, the founder of that church, about the nature of his religious beliefs, practices and experiences. The district court proceeded on the theory that such beliefs, practices and experiences might be shown to be so incredible as to demonstrate not only the insincerity of Reverend Moon, but the fraudulent nature of the entire church. While the Court of Appeals for the Second Circuit quite properly ordered the termination of the district court's inquiry and the striking of the testimony,[16] the damage caused to the Unification Church, and to the First Amendment non-entanglement principles, was not so easily undone, *cf.*, *Maness* v. *Myers*, 419 U.S. 449, 460 (1975), especially since the Second Circuit did not articulate principles or standards which would limit such inquiry in the future.

It remains for this Court to articulate the constitutionally mandated standards which prohibit religious fraud tort actions such as the present case. It is especially essential that the Court perform that role now, to provide religious institutions with the necessary "breathing space" to survive and grow under our system of constitutionally protected religious liberty. *Cf.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963). As the Court has emphasized, in cases such as this, "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Unless the Court acts now, the process of improper inquiry will go forward against various religious institutions in numerous cases around the country, inspired by the extraordinary and

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16 *In Re Holy Spirit Assn. for the Unification of World Christianity, et al.*, Docket No. 82-3035 (May 28, 1982).

unconstitutional results of the trial which occurred in this case, and further encouraged by the opinion of the Oregon Court of Appeals.

Indeed the present flood of religious fraud litigation not only constitutes an unconstitutional intrusion upon religious institutions and their members, it also imposes an unacceptable burden upon the already overtaxed dockets of the state and federal judicial systems. A clear statement by this Court of the constitutional limitations upon such litigation will go a long way toward ending this form of frivolous but time-consuming litigation, thereby enabling the courts to devote their resources to cases properly before them.

2. The Court of Appeals decision that a jury may determine the truth or falsity of oral representations to a church member concerning concededly religious practices and beliefs of the church, if the jury first finds that the "purpose" of the person making the representations was "wholly secular," is contrary to the decisions of this Court and critically undermines the zone of constitutional protection for religious minorities created by those decisions.

In *United States* v. *Ballard*, 322 U.S. 78 (1944), a fraud case, the Court held that neither judges nor juries may decide the truth or falsity of representations concerning religious dogma or the efficacy of religious practices, even where the representations could be demonstrated to be preposterous to a non-believer. 322 U.S. at 87. *Accord, Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940); *Thomas v. Review Board*, 450 U.S. 707, 101 S. Ct. 1425, 1429 (1981); *Founding Church of Scientology* v. *United States*, 409 F.2d at 1155.

The Oregon Court of Appeals, while paying lip-service to *Ballard*, created an exception that, in an atmosphere of hostility to an unpopular minority religious sect, would wholly swallow up the constitutionally necessary *Ballard* rule. According to the Oregon court, a jury need merely find first that the person making the representation about a religious practice was subjectively motivated by a secular purpose; once having made that finding, the jury would be free to deny the religious

character of the representations, to reject as factually false and fraudulent the entire doctrine and practices of the church, and to find the church liable in damages therefor.

The Court of Appeals' test is constitutionally flawed in at least two fundamental ways. First, the constitutional barrier to judicial inquiry into the truth of religious belief does not turn at all on the subjective purpose of the speaker, but rather on the inherent incompetence of a court to pass judgment on the question. Once it is acknowledged, as the Court of Appeals did below, that the representations concern religious belief or practice, a court simply may not inquire further into the truth or falsity of the representations consistent with the First Amendment. Religious beliefs and practices do not lose their religious character because a court or jury decides that they were discussed for secular reasons.

Second, the Court of Appeals' test provides no protection against, and indeed establishes a non-reviewable mechanism for, the exercise by juries of prejudice against unknown, controversial, or unpopular minority religious sects. The test would invite jurors who view the religious doctrines of such sects as preposterous or dangerous to impute a "secular" purpose to the propagators of such beliefs as a first step toward finding the doctrines themselves to be actionable as fraud. This Court repeatedly has noted that prejudices against such sects have existed in virulent form throughout history, and the Court has warned that the First Amendment requires that the judiciary insure that neither the courthouse nor the jury box be used to give sanction to or to legitimize such prejudices. *See, West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 640-42 (1943).

The dangers to First Amendment rights of the approach of the Oregon Court of Appeals is dramatized by its own inability to differentiate secular from religious purposes. Under the Court of Appeals rule, the only permissible religious purpose of speech, and hence the only religious speech protected by the *Ballard* doctrine, is speech intended to cause a person either to join a religious organization or to participate in its practices or services (A45). Representations about religious dogma or prac-

tice made for any other purpose, such as to explain the religion, to encourage tolerance of it, or to compare it with other religions, would subject the entire doctrine to judicial inquiry and sanction.

Indeed, even the purposes identified as "religious" by the Oregon Court of Appeals—to induce membership or participation—apparently would not always provide protection. For example, in this very case, the plaintiff herself alleged that the *purpose* of the representations made to her was to induce her to join the Church of Scientology and to participate in its central religious practice, auditing. That is precisely what occurred. The Court of Appeals nevertheless sanctioned a new trial in which, presumably, a jury could inquire into whether the attempt to induce Christofferson to join the Mission or participate in its concededly religious practices was motivated by non-religious reasons. Thus, the Court of Appeals "secular purpose" test would permit a jury to reject the stated nature, purpose and effect of the religious representations, and to find a hidden secular purpose based upon its own review of the practices of the religious organization or the motives of one of its staff members.

Further, the holding of the Oregon Court of Appeals that a purpose to raise money for the Church is secular, thereby subjecting the religious representations made to judicial inquiry as to truth or falsity, is wholly inconsistent with the decisions of this Court.

> [T]he mere fact that religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through spoken and printed words are not to be gauged by standards governing retailers or wholesalers of books . . . . It is plain that a religious organization needs funds to remain a going concern. . . . Freedom of speech,

> freedom of the press, freedom of religion are available to all, not merely to those would can pay their own way.

Murdock v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 111 (1943). *See also, Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940); *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640 (1981); *Larson* v. *Valente,* ____ U.S.____, 102 S. Ct. 1673 (1982).

The opinion of the Oregon Court of Appeals would have subjected the religious literature of Murdock, Cantwell, the Krishna Consciousness Movement, and, indeed, every religion which engages in fund-raising to an inquest into the truth of the underlying religious beliefs espoused. It would permit, for example, a jury to find that representations of the Catholic Church concerning heaven and hell are false, and are motivated by the church's purpose to obtain contributions from the faithful. *See Estate of Supple,* 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966), *cert. denied,* 389 U.S. 820 (1967).

The opinion of the Court of Appeals will serve as a catalyst for inquiries into the validity of the religious beliefs of numerous minority religious organizations throughout the country, which necessarily engage in fund-raising proselytization. It will encourage juries to act out their prejudices and preconceptions against such churches by finding that they are motivated by such secular purposes, and by imposing punishment against them.

3. The Court of Appeals decision approving the imposition of punitive damages against a church for the purportedly false oral representations of its staff members concerning the value of church practices violates both the Establishment and Free Exercise clauses, and is contrary to recent decisions of this Court disapproving the use of punitive damages in analogous contexts.

This Court on more than one occasion has warned of the dangers to minority groups or opinions inherent in jury awards of punitive damages.

> Juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm

> caused . . . They remain free to use their discretion selectively to punish expressions of unpopular views.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1976). *See also, International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50 n. 14 (1979) ("punitive damages may be employed to punish unpopular defendants.")

The threat to First Amendment rights in the use of punitive damages is particularly acute when they are imposed against a minority religious group in a case in which the only tort alleged arises out of expressive activity. The probability that such a trial will be converted into a witch hunt is amply demonstrated by this very case, in which the plaintiff's expert witness testified that Scientology "is on trial" (Tr. 1418) and in which the plaintiff's counsel repeatedly referred to the then-recent horrible occurrences at Jonestown, (with which Scientology had no connection or similarity), referred to Scientology as "locusts from Davis, California" who had "taken over" Oregon, commented disparagingly about the beliefs and practices of Scientology, and warned the jurors that Scientology was going to "change our city and our state" unless the jurors put a "stop" to it (Tr. 3344). The pleas to the prejudices and emotions of the jury were successful, as the jury awarded nearly two million dollars in punitive damages.

Indeed, it does not require any great perspicacity to recognize that the reason why there has been such a flood of religious fraud litigation in the state and federal courts in the wake of the jury verdict in this case was precisely because plaintiffs and their attorneys saw an opportunity to exploit the obvious unpopularity and controversial nature of some of the newer religious movements.

The impact of such potential jury verdicts upon the treasury and administration of a church and upon the pocketbooks and loyalty of its members raises substantial questions under both the Free Exercise and Establishment clauses. *United States* v. *Ballard*, 322 U.S. 78; *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). It significantly restricts the ability of a church to engage in its practices and programs, inhibits the exercise of

constitutionally protected rights to proselytize, *Cantwell* v. *Connecticut,* 310 U.S. 296; *Murdock* v. *Pennsylvania,* 319 U.S. 106, and discourages members from contributing to the faith, and even from remaining members. This is especially true with respect to minority religious sects, which both are more financially vulnerable to such awards, and more subject to the disapproval of jurors.

Additionally, the mere availability of punitive damages fosters excessive government entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. at 612-613. This is so for two reasons. First, in most states, including Oregon, the court and jury in assessing punitive damages are permitted and even required to consider the financial resources and programs of the Church. Thus, in this case, the plaintiff was permitted broad inquiry into the financial status and religious doctrines and practices of the Church and Mission defendants, and such evidence was presented to the jury and relied upon by the plaintiff in her request for punitive damages. Such "extensive state investigation into church operations and finances" is impermissible. *Walz* v. *Tax Commission,* 397 U.S. 664, at 691 (1970) (Brennan, J., concurring), and at 676 (Opinion of the Court). *See Surinach* v. *Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979). Second, the imposition of a penalty upon church treasuries "would bear unequally on different churches" depending upon their ability to withstand a substantial jury verdict, and "would surely influence the allocation of church resources." *Walz,* 397 U.S. at 69 (Brennan, J., concurring).

The violations of the Free Exercise and Establishment Clauses arising out of the imposition of punitive damages against religious organizations cannot be justified on the ground that such awards further a compelling state interest, let alone by the least restrictive means. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). "Only those [state] interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder,* 406 U.S. 205, 215 (1972).

The very purposes of punishment and deterrence furthered by awards of punitive damages, *Gertz* v. *Robert Welch, Inc.,*

418 U.S. at 350, are constitutionally suspect when the conduct sought to be punished or deterred is speech about religious practices. The danger that protected religious speech also might be punished or deterred by such awards is great indeed.

Even if it can be assumed that there is a state interest in protecting members of religious organizations from "fraudulent" representations about non-coercive religious practices, but see discussion *ante* at 9-14[17], that interest is amply served by awards of compensatory damages. The state has "no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 349. If the state retains any legitimate interest at all in punishment or deterrence of "fraudulent" religious speech, that interest may be met by resort against the individual who made the offending representations, and not against the entire church. To award a plaintiff a windfall at the expense not only of the Church, but of the faithful membership of the Church, imposes too great a burden on religious exercise and speech and creates too great a threat of punishing unpopular sects. See *Loney* v. *Scurr*, 474 F. Supp. 1186 (S.D. Iowa 1979).

Similar considerations recently led this Court to prohibit the imposition of punitive damages against labor unions for breaches of their duty of fair representation. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979). The Court found that punitive damage awards could "deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents", *id.* at 50-51, and inhibit the union in carrying out discretionary acts "essential to the proper functioning of the collective bargaining system." *Id.* The impact of such awards would be felt principally by the membership of the union and would have the effect of burden-

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17 Heretofore it has only been in connection with preventing frauds against the general public that the Court has recognized a possible interest in regulating the time, place and manner of soliciting by a religious organization. It has never sanctioned attempts to regulate the *content* of religious appeals nor suggested that the state can extend its regulatory arm into the church's inner sanctum.

ing the exercise of associational and collective bargaining rights guaranteed by the National Labor Relations Act. Although the Court found that the state's policy of awarding punitive damages might be rational in other contexts, it could not be applied in a manner which would undermine the policies furthered by the NLRA. 442 U.S. at 48.

Similarly, in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), the Court held that municipalities are immune from punitive damage awards under 42 U.S.C. § 1983 because it would not be equitable to provide a windfall to a plaintiff by punishing taxpayers for the unconstitutional act of a city official. *See also, Heritage Homes of Attleboro, Inc.* v. *Seekonk Water District*, 670 F.2d 1 (1st Cir. 1982).

Surely the rights of religious association and free exercise protected by the First Amendment are on at least as high a plane as the rights of association and collective bargaining furthered by the NLRA, and the general interests of taxpayers to avoid paying penalties for the illegal acts of municipal employees. Just as surely, the threat of imposition of huge punitive damage awards against minority religious groups is much greater than the threat of such awards against labor unions or municipalities, since it is much more likely that at least some jurors will be sympathetic to the interests of the union rank and file or the taxpayers than to the rights of an unpopular sect. Accordingly, the Court should apply the rationale of the *Foust* and *Newport* decisions to religious organizations, at least in cases in which the claim against the religious organization arises out of written or oral speech.

4. This case raises the substantial question of whether and under what circumstances a religious organization may be held liable for the tortious representations of its staff members or clergy. *Cf.*, *NAACP* v. *Claiborne Hardware*, ____ U.S. ____, 102 S. Ct. 3409 (1982); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978).

In *Claiborne Hardware*, the Court held that the First Amendment rights of the NAACP and its members to associ-

ate and to engage in protected concerted action required that the organization itself be protected from liability for the unauthorized acts of its members in furtherance of such concerted action. Only if the NAACP authorized or ratified the specific tortious acts alleged could it be held liable, even if the tortious acts could be found to have furthered the goals of the general course of concerted conduct. 102 S. Ct. at 3428-3430.

Analogous considerations led this Court to conclude that municipalities cannot be held liable under 42 U.S.C. § 1983 upon a *respondeat superior* basis because, under the Tenth Amendment, neither the Congress nor the federal courts can dictate the terms and conditions upon which a state hires or controls its employees. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 673, 691 (1978); *cf.*, *Rizzo* v. *Goode*, 423 U.S. 362, 376-78 (1976). Thus, the Court held that a municipality could be held liable under § 1983 only when it authorized or ratified unlawful conduct.

The rationale of *Claiborne Hardware* and *Monell* applies to religious organizations, which are protected not only by the associational rights of the First Amendment, but also by the more specific religion clauses of that Amendment. Just as in *Claiborne Hardware* a damage award against the NAACP ultimately would be felt by the membership and would inhibit their rights to associate and to engage in concerted political activity, so too, a damage award against a church ultimately would be directed principally against the membership, and would inhibit the exercise of religion by both the church and its members. See discussion of the effects of punitive damage awards, *ante* at 18-21. And, just as in *Monell* and *Rizzo* the Court could not impose upon a city a code of discipline for its employees, so too, neither the legislature nor the courts can define or monitor the relationship that obtains between a religious organization and its employees. *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979). The degree and manner of supervision that a church or religious body exercises over its employees is a matter for its own ecclesiastical boards and is the business of no other authority. The state cannot impose standards either directly or indirectly.

This is especially true when the tort which a clergyman is alleged to have committed is the making of religious misrepresentations. Under these circumstances, liability should attach to the church proper only if it can be shown that the alleged tortious statements were consistent with and authorized by the acknowledged and clearly enunciated policy or directives of the church. To permit inquiry as to whether or the extent to which a church has either sanctioned or tolerated the adoption of policies and practices which are contrary to the policies and practices which it has officially promulgated to its membership would make the court, rather than the church, the ultimate and definitive exponent of church doctrine. Moreover, to permit a church to be penalized for having tolerated non-conforming policies and practices would be to establish a degree of orthodoxy to which clergy must adhere. The state is incompetent to assume either of these roles.

The contrary is true. The First Amendment prohibits the judiciary from questioning the manner in which a church has characterized its religious policy and doctrine, from directing a church's religious affairs, and from determining for itself matters of ecclesiastical administration or discipline. *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 709 (1976); *Presbyterian Church in the United States* v. *Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969); *In the Matter of the Holy Spirit Ass'n for the Unification of World Christianity* v. *New York State Tax Commission,* 55 N.Y.2d 512 (1982). Indeed, as this Court has emphasized, not only is the making of findings of fact and conclusions of law prohibited, but so too is the very process of inquiry. *NLRB* v. *Catholic Bishop,* 440 U.S. 490, 502.

This Court accordingly should grant the petition to review the holding of the Oregon Court of Appeals in this case sanctioning a searching judicial inquiry into the authorization of staff members to make statements of church policy contrary to the enunciated and established policy of the church concerning the very question of the religious character of church practices. The uncontroverted evidence in this case, as recog-

nized by the Court of Appeals, demonstrated that the official and acknowledged literature, rules and regulations, and policy of the Mission emphasized the religious nature of the Mission, its courses and its practices, and stated explicitly that no contrary representations were authorized. The Court of Appeals decision that the respondent nevertheless can recover in fraud against the Mission if a jury were to find that a staff member made or authorized contrary statements for a secular purpose cannot stand under the First Amendment.

5. In ruling that the Mission must carry the burden of proving the religious purpose and character of the representations at issue, the Oregon Court of Appeals compounded the other errors to which this petition refers and imposed a further unconstitutional burden on the exercise of First Amendment rights. *Speiser* v. *Randall,* 357 U.S. 513 (1958); *First Unitarian Church* v. *Los Angeles,* 357 U.S. 545 (1958).

As the Court noted in *Speiser,* the burden of proof is often critical to the outcome of a case. Thus, where "the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated", the plaintiff must bear the burden of proving with "convincing clarity" that the statements which are attributable to a defendant are susceptible of regulation. *New York Times* v. *Sullivan,* 376 U.S. 254, 285 (1964). Where the plaintiff alleges that the defendants committed a religious "fraud", the plaintiff must prove that the defendant's statements were wholly secular as made. The burden of proving the protected nature of the challenged communications cannot be placed upon the defendant.

In fact, under the Establishment Clause, unless and until the plaintiff has proven the non-religious nature of the statements alleged to be fraudulent, she has not established either the justiciability of the issues or the subject matter jurisdiction of the court. *Watson* v. *Jones; NLRB* v. *Catholic Bishop.* Plaintiff and not the defendant carries the burden on these questions. *See, e.g., Thomson* v. *Gaskill,* 315 U.S. 442 (1941).

In the final analysis, given an area so difficult of proof and subject to juror misunderstanding and abuse as the religious character and purpose of representations, the party challenging the nature of the representations must carry the burden. To put the burden on the organization claiming religious protection would be to sanction heresy trials and invite broad judicial inquiries into religious belief. Who bears the burden of proof is no less critical a question to the outcome of this and similar cases and to the maintenance of constitutional standards than was the question of burden of proof decided in *In re Winship*, 397 U.S. 358 (1970). The Court should grant certiorari to resolve this fundamental question.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

December, 1982

Respectfully submitted,

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APPENDIX A

Judgment and Opinion of Court of Appeals of the State of Oregon

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHRISTOFFERSON,
Respondent,
v.
CHURCH OF SCIENTOLOGY OF PORTLAND et al,
Appellants.

(No. A7704-05184, CA 15952)

Appeal from Circuit Court, Multnomah County.

Robert P. Jones, Judge.

Argued and submitted September 3, 1981.

Charles J. Merten, Portland, and Emily M. Bass, New York, New York, argued the cause for appellants. On the briefs was Charles J. Merten, Portland.

Garry P. McMurry, Portland, argued the cause for respondent. With him on the brief were Patric J. Doherty, Ronald L. Wade, Rankin, McMurry, VavRosky & Doherty, William T. Powers and Powers & Powers, Portland.

Elden M. Rosenthal and Leslie M. Roberts, Portland, filed a brief amicus curiae for Cooperating Counsel for the American Civil Liberties Union of Oregon.

James K. Hoops, Lee Boothby, and Robert W. Nixon, Portland, filed a brief amicus curiae for Americans United for Separation of Church and State.

Before Gillette, Presiding Judge, Young, Judge, and Roberts, Judge Pro Tempore.

GILLETTE, P. J.

Reversed as to defendants Church of Scientology of Portland and Delphian Foundation; reversed and remanded for a new trial as to defendants Samuels and Church of Scientology, Mission of Davis.

GILLETTE, P. J.

Defendants appeal from the judgment entered on a jury verdict in favor of plaintiff in her action for fraud and intentional infliction of emotional distress ("outrageous conduct").[1] Plaintiff's fraud cause of action alleged 14 misrepresentations which induced her to pay some $3,000 to defendants. Her cause of action for outrageous conduct alleged in two counts a scheme to gain control of her mind and to force her into a life of service to defendants and a course of retaliatory conduct after plaintiff disassociated herself from defendants. Defendants interposed various defenses, including a defense based upon the Free Exercise Clause of the First Amendment. The jury awarded compensatory and punitive damages. We reverse and remand.

THE PARTIES AND THE FACTUAL BACKGROUND

Plaintiff is a young woman who moved to Portland from Eureka, Montana, in July, 1975, shortly after she graduated from high school, intending to obtain some work experience before going to college in the fall to study civil engineering. When she first arrived, she stayed for a few days with a friend from Montana, Pat Osler, and then moved into an apartment with a young woman she met through Osler. She soon found a job with an engineering firm and worked there full-time.

Defendants are the Church of Scientology of Portland (COSOP), a religious corporation; the Church of Scientology, Mission of Davis (the Mission), also a religious corporation; the Delphian Foundation (Delphian), a nonprofit educational institution not expressly organized as a church-related school; and Martin Samuels, an ordained minister of the Church of Scientology and the president of the Mission and Delphian.

The beliefs of Scientology were summarized in *Founding Church of Scientology v. United States,* 409 F2d 1146, 1151-52, (DC Cir 1969), in a manner which appears to be accurate according to the record before us in this case:

[1] Plaintiff's complaint also contained a cause of action for Unlawful Trade Practices against all defendants. The jury found that the action was barred by the statute of limitations as to all defendants except the Church of Scientology of Portland. As to the Church, it awarded no damages on that claim, and we are not asked to review that verdict.

"The movement apparently rests almost entirely upon the writings of one man, L. Ron Hubbard, an American who maintained the headquarters of the movement in England at the time this action was brought. In the early 1950's, Hubbard wrote tracts elucidating what he called 'Dianetics.' Dianetics is a theory of the mind which sets out many of the therapeutic techniques now used by Scientologists, * * *.

"The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed none of the human misjudgments which create social problems and much individual suffering. These are traceable rather to the reactive mind, which is made up of 'engrams,' or patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These imprinted patterns may be triggered by stimuli associated with the original imprinting, and may then produce unconscious or conditioned behavior which is harmful or irrational.

"Dianetics is not presented as a simple description of the mind, but as a practical science which can cure many of the ills of man. It terms the ordinary person, encumbered by the 'engrams' of his reactive mind, as a 'preclear,' by analogy to a computer from which previously programmed instructions have not been erased. The goal of Dianetics is to make persons 'clear,' thus freeing the rational and infallible analytical mind. The benefits this will bring are set out in considerable and alluring detail. All mental disorders are said to be caused by 'engrams,' as are all psychosomatic disorders, and that concept is broadly defined.

"A process of working toward 'clear' is described as 'auditing.' This process was explicitly characterized as 'therapy' in Hubbard's best-selling book *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (1950). The process involves conversation with an 'auditor' who would lead the subject or 'preclear' along his 'time track,' discovering and exposing 'engrams' along the way. Though auditing is represented primarily as a method of improving the spiritual condition of man, rather explicit benefits to bodily health are promised as well. Hubbard has asserted that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis, ulcers and sinusitis are psychosomatic and can be cured, and further that tuberculosis is 'perpetuated by engrams.'

"* * * * *

> "The Hubbard Electrometer, or E-meter, plays an essential, or at least important, part in the process of auditing. The E-meter is a skin galvanometer, similar to those used in giving lie detector tests. The subject or 'preclear' holds in his hands two tin soup cans, which are linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin. The auditor asks questions of the subject, and the movement of the needle is apparently used as a check of the emotional reaction to the questions. According to complex rules and procedures set out in Scientology publications, the auditor can interpret the movements of the needle after certain prescribed questions are asked, and use them in diagnosing the mental and spiritual condition of the subject." (Footnotes omitted).

From Dianetics developed Scientology, which incoporates Dianetics, but includes broader concepts. As characterized in *Founding Church, supra:*

> "With Scientology came much of the overlay which lends color to the characterization of the movement as a religous one. Hubbard has claimed kinship between his theories and those espoused by Eastern religions, especially Hinduism and Buddhism. He argues that man is essentially a free and immortal spirit (a 'thetan' in Scientological terminology) which merely inhabits the 'mest body' ('mest' is an acronym of the words matter, energy, space, time). Man is said to be characterized by the qualities of 'beingness,' 'havingness,' and 'doingness.' The philosophical theory was developed that the world is constructed on the relationships of 'Affinity,' 'Reality' and 'Communication,' which taken together are denominated 'the ARC Triangle.'" 409 F2d at 1152. (Footnotes omitted).

The thetan is said by Hubbard to be immortal; it is the spirit controlling the body, through the mind. After the death of the body, the thetan "exteriorizes" and returns in another body. The thetan does not care to remember the life just lived when separated from the body and mind, but because each individual comes back, he is responsible for what goes on today because he will experience it tomorrow.

Plaintiff became involved with Scientology[2] almost immediately upon arriving in Portland. Her friend Osler

[2] References to "Scientology" refer to plaintiff's involvement with the movement in general and do not refer to plaintiff's relationship with any particular defendant.

was taking courses from the Mission and, on his advice, she enrolled in a communications course offered by the Mission. As part of the enrollment process, she also applied for membership in the Church of Scientology. Because she was not yet 18 years old, she was told that she must obtain her mother's consent to receive the services offered by the Mission. She telephoned her mother and dictated a consent form which her mother typed, signed and returned.

Plaintiff paid $50 for the communications course and began attending classes at the Mission every evening after work and at least one day on the weekends. Before completing the communications course, she signed up for another course and continued to participate in courses and services offered at the Mission until the beginning of October, 1975.

In early September, plaintiff applied to become a provisional staff member at Delphian, located at Sheridan, Oregon. She informed her parents that she had decided not to attend college that fall. Moving to Delphian in early October, she worked as a provisional staff member until the beginning of December. At that time, she was asked to leave Delphian until she could convince her mother to stop opposing her involvement in Scientology. Plaintiff moved from Sheridan back to Portland and worked as a waitress. While there, she worked with a staff member of the Mission, attempting to convince her parents not to interfere with Scientology.

Plaintiff went home for Christmas and then returned to Portland in the early part of January, 1976. She lived with several people, mainly Scientologists, and continued to work as a waitress. She did not participate in courses or programs at the Mission, but continued to work on "handling" her parents. In April, 1976, plaintiff went to her parents' home in Montana to "handle" them, that is, to convince them to accept her involvement in Scientology, or else to "disconnect" from them. When she reached home, she was locked in the house and "deprogrammed." She did not return to her involvement with Scientology and, in fact, became active in anti-Scientology activities and participated in "deprogramming" others. She filed this action in 1977.

Defendants raise 52 assignments of error, covering nearly every phase of the proceedings from pretrial to post-verdict. Organization of the issues is somewhat complicated by the various causes of action and the various defendants. Several assignments involve the First Amendment defense raised by defendants. However, before reaching the constitutional issues which must be decided in this case, we first consider non-constitutional challenges to the outrageous conduct cause of action.

OUTRAGEOUS CONDUCT

Plaintiff alleged two counts of outrageous conduct. The first alleged a scheme to gain control of her mind and to force her into a life of service to defendants. The allegations in this count involve actions committed by defendants during the time that plaintiff was involved with Scientology. At the close of the case, defendants moved for directed verdicts on this cause of action, arguing that, as a matter of law, plaintiff had not proved acts that exceeded the limits of social toleration.[3]

The tort of intentional infliction of emotional distress, or outrageous conduct, is still in the process of developing in this state. For example, there remain some questions as to what state of mind is required in particular situations to subject a defendant to liability. *See Brewer v. Erwin,* 287 Or 435, 454-58, 600 P2d 398 (1979); *compare Turman v. Central Billing Bureau,* 279 Or 443, 568 P2d 1382 (1977), *with Rockhill v. Pollard,* 259 Or 54, 485 P2d 28 (1971).

A "special relationship" between the parties has played a role in every case in this state involving this tort.[4]

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[3] The motion below was directed to both counts of the outrageous conduct claim. On appeal, defendants argue that there was no outrageous conduct as a matter of law as to Count II. As to Count I, defendants do not make that precise argument, but make several other arguments, including the argument that the actions are protected by the First Amendment. We decide the issue as to both counts on the non-constitutional basis rather than reach the constitutional issue as to Count I.

[4] *Brewer* specifically did not decide whether there could be recovery in a situation in which there was no special relationship and where only recklessness was shown. One of defendants' assignments of error concerns an instruction which informed the jury that plaintiff could recover if defendants acted recklessly. Plaintiff had previously withdrawn portions of her complaint which alleged a special relationship between her and defendants. We do not reach the issue of the instruction because we dispose of the outrageous conduct claims on other grounds.

The tort was characterized in *Turman v. Central Billing Bureau, supra,* as " '* * * an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. * * *.' " 279 Or at 446. *See also Brewer v. Erwin, supra* (landlord and tenant); *Rockhill v. Pollard, supra* (doctor and patient); *Fitzpatrick v. Robbins,* 51 Or App 597, 626 P2d 910, *rev den* 291 Or 151 (1981) (landlord and tenant); *Bodewig v. K-Mart,* 54 Or App 480, 635 P2d 657 (1981), *rev den* 292 Or 450 (1982) (employer-employe).[5] The role of that relationship has recently been explored in *Hall v. May Department Stores Co.,* 292 Or 131, 637 P2d 126 (1981), a case involving an employer-employe relationship, in which the court stated:

> "The character of the relationship bears on the mental element required to impose liability, *compare Rockhill* with *Turman* and *Brewer,* and also on the next issue, the offensiveness of conduct that crosses the threshold of potential liability, *see Pakos v. Clark,* [253 Or 113, 453 P2d 682 (1969)]." 292 Or at 137.

A plaintiff's particular susceptibility to distress has also played a part in certain of the cases. *See Rockhill v. Pollard, supra* (plaintiff already distraught because of automobile accident and injury to child); *Turman v. Central Billing Bureau, supra* (plaintiff blind and suffering from glaucoma, requiring treatment by clinic for which bill was being collected); *Fitzpatrick v. Robbins, supra* (plaintiffs aged and visually disabled).

Part of the uniqueness of this case lies in the absence of both of the considerations just discussed. At the close of the evidence, plaintiff withdrew the portion of her complaint which alleged a special relationship between her and defendants. Neither does she argue on appeal that she was in any way particularly susceptible to the infliction of emotional distress.[6]

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[5] *Bodewig* involved one party defendant who had no special relationship to the plaintiff. However, even in that case, some of the acts necessary to establish the tort were committed only by the employer-defendant, *albeit* with the other party defendant's encouragement.

[6] Plaintiff was 17 years old when she first enrolled in the communications course but turned 18 soon after. She does not contend that her age or the fact that she was living on her own for the first time made her particularly susceptible to the infliction of emotional distress.

The type of conduct for which liability may be imposed for infliction of emotional distress, absent physical injury, is not well defined. *Rockhill v. Pollard, supra,* rejected the description in Restatement (Second) of Torts § 46 (1965)[7] and decided:

> "We need a simpler test and think it best for this case to merely hold that the conduct must be outrageous in the extreme. It is our impression that the test for liability in these cases can only be worked out on a case by case basis. Here we must determine whether defendant's conduct was so extreme as to warrant the imposition of liability for any severe emotional distress caused thereby." 259 Or at 59-60.

In later cases, the type of conduct which would subject a defendant to liability has been characterized as "beyond the limits of social toleration." *Brewer v. Erwin, supra,* 287 Or at 458; *see also, Hall v. May Department Stores Co., supra,* 292 Or at 137.

Although it is ordinarily for the trier of fact to determine not only the historical facts, but also "whether the offensiveness of the defendant's conduct exceeds any reasonable limit of social toleration," *Hall v. May Department Stores Co., supra,* 292 Or at 137,

> "[i]t [is] for the trial court to determine, in the first instance, whether the defendants' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. If the minds of reasonable men would not differ on the subject the court [is] obliged to grant an order of involuntary nonsuit * * *." *Pakos v. Clark, supra,* 253 Or at 132.

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[7] The Restatement describes the conduct which gives rise to liability as follows:

> "* * * It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " Restatement (Second) of Torts, § 46, comment d (1965), quoted in *Rockhill v. Pollard, supra,* 259 Or at 59-60.

The trial court here erred in denying defendants' motions for a directed verdict as to count I of the outrageous conduct cause of action. We find no conduct both alleged and proved under that count that could subject defendants to liability for the tort. Plaintiff's first count alleges:

> "That the above misrepresentations and other unlawful practices were part of a scheme to gain control of Plaintiff's mind and force her into a life of service to the Defendants. She was intentionally alienated from her family and friends. Plaintiff's ability to direct her life and form reasonable judgments was intentionally impaired by Defendants through the use of a crude polygraph, intense peer pressure and other covert means. She was coerced into performing labor for which she was not paid. She was held up to ridicule, humiliated, and forced under threat of retribution and physical harm to follow the dictates of the Defendants, and caused to give Defendants all the monies she had or could beg or borrow from others.
>
> "As part of the above scheme, Defendants caused Plaintiff to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests."

In this pleading, defendants' intent, their conduct and the effect on plaintiff are interwoven. However, this interweaving should not be permitted to obscure the fact that each of the three elements—intent, conduct which is outrageous or beyond the limits of social toleration, and resultant severe emotional distress—must be proved. In the present case, defendants made no argument concerning intent, but they maintain that there is not sufficient evidence of either of the last two elements—the outrageous conduct and the resultant distress—to permit the case to go to a jury. We agree that there is no sufficient evidence of the resultant severe emotional distress. However, that specific basis for taking the case from the jury was not argued to the trial court and we therefore decline to reverse the court on that basis. This brings us to a consideration of the evidence concerning defendants' conduct. It is only by proof of conduct that is "beyond the limits of social toleration" that plaintiff may recover in an action for outrageous

conduct, no matter what defendants may have intended and no matter what the effect on plaintiff may have been.[8]

With respect to the well-pleaded allegations, the evidence, viewed in the light most favorable to plaintiff, is as follows. Plaintiff enrolled in the communications course on the advice of her friend Pat Osler. She paid $50 and began the course almost immediately. In signing up for the course, plaintiff filled out forms which stated that she was applying for membership in the Church of Scientology and which explained that Scientology was a religion. Because she was 17 years old at the time, she was required to get permission from her mother to take the course and did so. Plaintiff did not pay any attention to the explanations of the religious nature of the courses because she was told that she had to fill out the forms in order to be allowed to take the communications course, and that was all she was interested in.

Plaintiff found a job working full-time in an engineering office in Portland and was living with a non-Scientologist roommate. She testified that she would go to work until 5 p.m. or 6 p.m. and then attend class every evening from about 7 p.m. until between 10 p.m. and midnight. She also attended class at least one full day, and often both days, on weekends. This schedule continued from July 13, when she began the communications course, until the beginning of October, when she moved to Delphisn. At the same time, plaintiff maintained contact with family members and friends in the Portland area, visiting them a number of times and corresponding regularly with her mother.

The communications course in which plaintiff first enrolled consisted of a set of "drills" which were practiced on an individual basis with a supervisor. As part of each drill plaintiff would read bulletins which described the theory of the particular drill to be undertaken. She was

[8] It may well be that much of the *effect* on plaintiff that is alleged is not "emotional distress" either, but we need not consider here whether recovery for such effects may be had in an action for outrageous conduct. We note that the misrepresentations which are re-alleged are the same misrepresentations which form the basis for the fraud action. These representations are not separately sufficient to be actionable as outrageous conduct.

then "checked out" on that information to be certain that she understood what she had read. Then she would practice the drill "to a win," that is, until she could complete the drill as prescribed. After completing each of eight drills, plaintiff repeated each on a more difficult level until a final pass was achieved.

The drills were described by plaintiff at trial. The first drill involved reading a bulletin entitled "How to Study" and being checked out on it. The second drill involved reading the prescribed bulletin and then sitting across from another person with eyes closed and attempting to clear her mind of all thoughts and to eliminate all outside influences or distractions. She testified that she practiced this drill for "a couple of hours" before her supervisor indicated that she had completed it to a win. The third drill involved the same procedure, except that she sat across from her supervisor with her eyes open.

The fourth drill is called "bullbaiting." Plaintiff described it as follows:

> "* * * You're sitting with your eyes open facing another person. The other person, while you're sitting there staring at them, tries to distract you by telling you jokes, making fun of you, pointing at you, touching you, making faces at you, trying anything that they can to make you laugh or twitch or cry or frown - make any sort of acknowledgement that you heard what he said or saw what he did.
>
> "And the objective is to be able to sit there while that person says anything to you and does anything around you without thinking about what they're doing, and without getting mad - making any gestures.
>
> "Q: How was it practiced on you?
>
> "A: Well, first of all they started by just telling me jokes and I like a good joke and I would laugh. And they would say: Flunk, you laughed. And they would start you all over again on the same drill and they would tell the same jokes until they reached a point that you no longer laughed at it.
>
> "They would make fun of me. * * * Well, they teased me about my religion; they teased me about sex; they teased me about my looks. Some of them made gestures toward me like coming up close to me as if they were going to kiss me or touch me. * * * As soon as they found an area that caused me to laugh more or to frown or to cry, they would

go into that area in depth and * * * try and get me embarrassed or to cry or make some sort of reaction.

"Q: Did they use obscene words or any foul language?

"A: Yes, they did. I was embarrassed by obscene words and they used obscene words a lot. Every obscene word that I ever heard was used.

"Q: Were you reduced to tears?

"A: Yes, I was, at times.

"Q: How long did the bullbaiting thing go on?

"A: I was bullbaited several different times during the communications course, through three weeks."

After plaintiff was able to complete the bullbaiting drill, she participated in teaching it to other people.[9]

The next drill required that plaintiff read sentences from Lewis Carroll's *Alice in Wonderland* and *Through the Looking Glass* until she was able to read without any inflection. After that drill plaintiff participated in a drill which was described as "learning to acknowledge someone."

"And in that drill the person that's acting as coach would * * * ask you a question and all you were supposed to do is acknowledge them by saying: 'Good,' or 'Yes.' And you weren't supposed to put again any inflection in your voice. You were supposed to just say it. * * * There was no specific meaning to it or anything; just to get the person to know that you heard what they said.

"Q: What type of questions were asked?

"A: There were two questions; one was * * * I don't think they were all questions. I think the person just read phrases out of the books 'Through the Looking Glass' and 'Alice in Wonderland.'"

The next drill was learning how to receive an acknowledgment from a person.

"And what that was there were two questions. The first one was 'do fish swim' and the second one was 'do birds fly.' * * * [Y]ou sat across from the coach and you say to him: Do fish swim. And the coach tries to ignore you and you try to say it in as much of a forceful manner that you get an acknowledgement from him. And he will sit there and

[9] There was other testimony regarding the experiences of others in bullbaiting on other occasions when plaintiff was not present. However, in considering defendants' conduct toward this plaintiff, we consider as relevant only what plaintiff experienced.

> laugh at what you're doing, or totally ignore you. And you're supposed to just sit there and stare right at him and clear your head of all thoughts and ask him this question with such force that he feels he has to answer you.
>
> "And then, as another step up from that same drill, the coach, instead of just ignoring you or laughing, will begin to make remarks just like in the bullbaiting drill. You will say: Do birds fly. He will say: I don't know, what do you think. And then you're supposed to just repeat the question 'Do birds fly' until you get him to answer. And he will - sometimes the person will say that they have a headache or that they want a drink of water and you're supposed to say - you're supposed to get them to forget that they have a headache or that they need something and to answer your question for you."

Plaintiff's memory was not clear on four further drills, called "upper indoctrination" drills. One involved reading a bulletin entitled "What is Control," which plaintiff remembered as "telling you how to control people and how to achieve the response and the actions that you want to achieve from the other person." Another involved learning commands, such as "Look at the wall, walk over to that wall, touch that wall, turn around." In another drill,

> "* * * you give a command to [an] ashtray as you hold it in front of you. I can't remember what the commands were, but they were something like * * * 'Rise up,' or something. And you raise the ashtray up and you do this drill over and over until you are convinced that you have told the ashtray to move and it has moved."[10]

Plaintiff completed the communications course in about one month. However, on July 25, 1975, less than two weeks after she started that course, she signed up for another, known as the Student HAT course, for which she paid $250 to the Mission. While she was taking the communications course she was also approached by the Mission staff about receiving "auditing," for which certain claims were made that are included among the misrepresentations alleged in the fraud action. When she was approached about "auditing" by a staff member, he told her everyone has "hangups" that inhibit communication and asked if she

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[10] There was some other testimony concerning the type of activities involved in the "upper indoctrination" drills. Although somewhat more detailed, it is substantially the same as plaintiff's descriptions.

would like to get rid of all of her hangups and improve herself. Plaintiff signed up for auditing because the staff member told her it was the best thing she could do for herself, she was convinced that it was, and she wanted to develop herself to her fullest potential. On July 26, plaintiff paid $780 and on July 31, she paid an additional $1100 for a number of hours of auditing.

Because she did not have the money to pay for the hours of auditing she was told she would need, plaintiff was coached by Mission staff members to borrow money from friends and family. The staff members helped her to call people and ask to borrow money. A staff member would tell her the type of conversation to use and sit there while she called, giving her ideas and suggestions. In the evenings when she went to the Mission she would take courses for a while and then be asked to come to a staff member's office to make phone calls. She borrowed $700-800 from friends and family and another $500 from Freedom Federal Credit Union, which is operated by Scientologists.

Plaintiff began the Student HAT course and the auditing right after completing the communications course, approximately in mid-August. She took the course on weekends and participated in auditing in the evenings during the week. As explained above, the purpose of auditing is claimed to be to relieve the negative effects of past experiences. This is accomplished by the use of an "E-meter," which is a crude galvanometer. The individual receiving the auditing holds what are described as two tin cans, one in each hand. The cans are connected to a device which has a needle which reacts in some manner to the responses made.[11]

Plaintiff testified that the auditor would ask a question, such as "Do you have any problems with your

[11] The E-meter was described in *United States v. Article or Device, etc.*, 333 F Supp 357 (DDC 1971):

> "The E-meter is essentially a simple galvanometer using two tin cans as electrodes. It is crude, battery-powered, and designed to measure electrial skin resistance. It is completely harmless and ineffective in itself. A person using the meter for treatment holds the tin cans in his hands during an interview with the operator who is known as an auditor and who purports to read indicators from the galvanometer needle as it notes reactions to questions. * * *"

parents?" She would describe a particular argument, and he would ask if there were earlier, similar times she had had arguments with her parents. She testified that he would take her back earlier and earlier until he decided she had related the earliest incident and her "needle was floating." The auditor would then go on to another question.

The time spent on auditing varied. Plaintiff testified:

> "I spent at least two hours, and often as many as five or six hours in auditing. If a point was reached, after a couple of hours, where I was pretty happy, then the auditor would end the session. But if during the course of the questions he asked me, I became very upset and cried or wouldn't answer his questions, he would keep asking me questions over and over again until I reached a point where he felt it was safe to end the session.
>
> "There was a rule that in auditing that the auditor could never let the person leave when they were upset. And so I remember a number of times that I became real upset and just wanted to leave and go home and get out of the place, but he said: No, just sit down. The way out is the way through, was the phrase he used. What upsets you the most by talking about it more with me will help you overcome it."

The Student HAT course involved listening to tapes of lectures by L. Ron Hubbard, the founder of Scientology, and reading various bulletins, after which plaintiff would be examined to determine whether she knew the material contained in each one. These materials concerned proper study habits and methods and the values of auditing.

In conjunction with the Student HAT course, plaintiff attended Friday evening "musters," which all students in the communication course and the Student HAT course were required to attend. According to plaintiff, the purpose of these meetings was "to discuss our progress on the course and reinforce one another, telling each other how many points we had made."[12] She described the musters as follows:

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[12] The students received points for what they learned in the courses, and a charting system was maintained in which each student's points were recorded to show his or her progress in Scientology.

"Well, I would go into the graduation room and be seated and then someone would come in that was officiating that night. And it varied, like the person would come in and usually do something to get everybody to relax. One of the most common things they did was to say: I want everybody in here to introduce themself to two people in the room that they have never met before. And then the people would do that and they would be relaxed and then he would start talking about Scientology and Dianetics and communications course and all of these things and how we were all going to become part of clearing the planet or making sure that everyone on the planet got Dianetic auditing.

"Sometimes they did little drills like: Once a person asked us to locate a space around us that we would call ours and then everyone would sit there and do that. And he would say: Now increase that space - increase that space to include you and two people beside you, and you do that. And then he would say: Increase the space to include this room, and we did that.

"He would say: Increase the space to include the whole world, and you just bodily increased it to that spot. And he said: See what it is going to be like. We are going to increase ourselves until we get everyone on this planet clear."

The graduates of the courses would stand up and tell the group what they had gained from the course. They would

"* * * say how it had changed their lives and how they were - they had finally found meaning and finally found a way to improve themselves and rid themselves of their harmful past, emotions and attitudes."

Around the end of August or the beginning of September, staff members at the Mission began to talk to plaintiff about becoming a staff member. They told her how rewarding it was, and they began to talk about Delphian. Certain of the claims made for Delphian are included as misrepresentations alleged in the fraud count. According to plaintiff's testimony, she was told that she could take courses at Delphian which could be applied toward a college degree, that she would learn about architecture and engineering "from the ground up" and that Delphian was partially funded by government grants for doing research in solar and wind energy and recycling. Plaintiff decided that going to Delphian would be the best way to combine

her interests in architecture and engineering with her interest in Scientology and Dianetics. She informed her parents that she would not be going to college that fall as she had planned; instead, she applied to Delphian as a provisional staff member. After visiting her parents' home in Montana in September, she moved to Delphian at the beginning of October.

Plaintiff was assigned to live in a room with two other women and two children. She had a small space for her belongings. She worked harvesting crops for a couple of weeks after she arrived and then helped to move an old garbage dump on the property. In the evenings, she worked indoors cleaning floors, washing dishes and other such tasks. Her work day extended from 8:30 a.m. to 11 p.m. or later. After three or four weeks, she was assigned to care for small children of other staff members. She was given instructions on using Scientology methods in caring for the children. She worked as a "nanny" until she left Delphian. She received wages of a few dollars a week.

Visitors were not encouraged at Delphian, and plaintiff was instructed that two-weeks notice was necessary if visitors were coming. She described one incident that occurred around Halloween when she was reprimanded because her mother and one of her friends from Montana came to visit unannounced. Plaintiff's mail was sometimes opened before she received it at Delphian.

Beginning in October and continuing into November, plaintiff reported to Delphian staff members that her mother was very concerned about her involvement with Scientology. She had been told that she must report that kind of activity, because if it was upsetting to her it would inhibit her progress in Scientology. Plaintiff eventually became aware that her mother had hired a lawyer to find a way to get her away from Delphian. She informed the staff of this action and that her mother had also gone to the media.

Plaintiff was told that this kind of activity was bad for Scientology and that it would give Delphian and Scientology a bad reputation. She was told that she would have to leave Delphian until she could "handle" her parents,

which meant that she must convince them to sign a statement that they would not sue, attack or embarrass Scientology or Delphian.

Plaintiff left Delphian in late November or early December and returned to Portland. She began working as a waitress in an hotel and lived in a house with several other people, including her friend Osler, who had also been at Delphian during the time plaintiff was there and had left when she did. Plaintiff went to the Mission and saw staff member Jim Brooks, who was to help her handle her parents. She was told that she could not take any classes or auditing until she could handle them. She was informed that in order to continue in Scientology she had to handle her parents or "disconnect," *i.e.*, cut off all relations with them.

Brooks coached her on what to say in letters to her parents to convince them to allow her to continue in Scientology without interference. Plaintiff obtained permission from Brooks to go home for Christmas to attempt to handle her parents. She rode home with her brother, who lived near Portland. Her parents would not agree to plaintiff's requests, and plaintiff returned to Portland with Osler.

Under the direction of Brooks, plaintiff wrote her parents a letter on January 5, 1976, informing them that she was no longer involved with Scientology. Although that was not true, Brooks told her it would help her family "destimulate." She continued to report her parents' activities to Brooks, including an unsuccessful attempt to hold plaintiff in an hotel for "deprogramming." Brooks coached plaintiff in writing letters to her parents, either asking that they not interfere with her involvement in Scientology or "good road, fair weather" letters avoiding the subject of Scientology.

Plaintiff also met with Kay Wilson from COSOP, who told her that if she wanted to continue in Scientology she would have to disconnect from her parents. Regarding that conversation, plaintiff testified:

> "We were discussing my mother and I told Kay Wilson that my mother had hired an attorney and that she had told me all these things about Scientology I had never heard about. My mother mentioned something about a

> Fair Game Law and I said that to Kay Wilson. And she said: Oh, that policy letter has been cancelled. However, the treatment of suppressive persons is still the same."

A "suppressive person" is one who attempts to damage or interfere with Scientology. The Fair Game policy was proclaimed by L. Ron Hubbard in a policy letter of October 18, 1967. It stated that suppressive persons "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued, lied to or destroyed."[13] Plaintiff testified that she had been shown several policy letters regarding treatment of "suppressive persons." Plaintiff had been told that her mother was suppressive.

Plaintiff did not want to disconnect from her parents, but she did want to continue in Scientology. She asked for permission from Brooks to go back to Montana to persuade her parents to agree not to sue, attack or embarrass Scientology and not to interfere with her involvement in it. She made the trip in April, 1976. When she arrived at her parents' home, she was locked in the house and "deprogrammed." As a result, plaintiff decided that she did not want to return to her involvement in Scientology, and she did not.

Whether viewed as individual acts or taken together as a "scheme," we find nothing in this record which constitutes conduct which is "beyond the limits of social toleration." There is no evidence that plaintiff was threatened or forced to remain involved in Scientology. To the contrary, she maintained many contacts with non-Scientologists. She had a full-time job both before and after her stay at Delphian. The record shows that she visited with relatives living in the Portland area periodically while she was there. She maintained correspondence with her parents and went back to Montana twice before her visit in April when she was "deprogrammed." Her parents or her mother visited her several times in Portland or at Delphian. Plaintiff became involved and maintained her

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[13] Defendants maintain that this policy had been cancelled. There was conflicting evidence as to the status of the policy and its meaning. We need not resolve those conflicts because the mere existence of the policy does not constitute outrageous conduct as to this plaintiff.

involvement because she desired to do so. If misrepresentations were made regarding the benefits or the nature of Scientology which gave rise to that desire, her remedy would be for fraud, not outrageous conduct.

Plaintiff was recruited and indoctrinated into the Church of Scientology. That recruitment and indoctrination, as far as this record discloses, were not so very different than might be used by any number of organizations. She joined the group voluntarily, albeit, as she claims, on the basis of misrepresentations made to her. However, she continued to participate and maintained her involvement for whatever reason without actionable threats or coercion by defendants.

The drills plaintiff was subjected to as part of the communications course she initially signed up for were not in themselves outrageous. Plaintiff studied the theory behind each drill before participating in it. She returned day after day to participate in the course, although she had daily contact with non-Scientologists in her job and at her apartment with her non-Scientologist roommate. The most that can be said is that plaintiff was convinced by defendants to accept what they were teaching; unless the means involved more than persuasion, that is not outrageous. Whether or not we find any merit to defendants' teachings, plaintiff apparently did find merit in them during the time she was associated with Scientology. The fact that she was later convinced of their invalidity does not make defendants' conduct outrageous *post hoc*.

The only evidence which supports the allegation that plaintiff was caused "to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests" is the testimony regarding the Fair Game policy. Plaintiff testified that *after* she was "deprogrammed" she was fearful of retaliation by defendants. There is no evidence that *during* her association with Scientology plaintiff was afraid to terminate her involvement or feared defendants in any way. The fact that she was informed of a policy known as Fair Game is not outrageous conduct.

We hold that the evidence presented under Count I of the outrageous conduct cause of action does not, as a matter of law, establish conduct that is outrageous in the extreme or beyond the limits of social toleration.

Count II of the outrageous conduct action[14] alleges that:

> "Subsequent to Plaintiff's deprogramming, Defendants have pursued a course of conduct against Plaintiff that is designed to threaten, humiliate, and intimidate Plaintiff and cause her fear, anguish and mental distress. Defendants on June 7, 1977, filed suit against Plaintiff without cause and for the purpose of intimidating Plaintiff; Defendants have, in June of 1976 and April of 1977, declared Plaintiff to be a suppressive person subject to Defendants continuing 'fair game' policy of retribution which directs Defendants' organizations and other Scientology organizations and their members to trick, lie to or destroy Plaintiff. Defendants have, beginning in June of 1976 and continuing to the present, forbid, through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff; Defendants have caused and continue to cause the mailing of materials to Plaintiff and Plaintiff's family subsequent to Plaintiff's request that such mailings cease."

Defendants moved for a directed verdict on this count as well, on the basis that the conduct proved was not such that it could subject them to liability.

The evidence established, first, that a libel action was filed by certain of the defendants against plaintiff after a press conference in which plaintiff participated. That matter was still pending at the time of the trial of this action. We said in *Erlandson v. Pullen,* 45 Or App 467, 472, 608 P2d 1169 (1980):

> "Without necessarily suggesting that it could never be so, we note that it would be a rare case in which the bringing of a lawsuit would fit the definition of outrageous conduct. This tort has been reserved for 'intentional acts of

[14] This count was withdrawn as to defendant Delphian at the close of the evidence. COSOP and defendant Samuels contend that no involvement by them was shown. Because of our disposition of this count on other grounds, we need not reach that issue. We use the term "defendants" here without delineating whose involvement was shown.

a flagrant character under most unusual facts and circumstances * * *' *Melton v. Selen*, 282 Or 731, 736, 580 P2d 1019 (1978)."

Here the record reveals nothing about the other case except that it was an action for libel. We do not know, nor can we infer from this record, that it was without foundation. Such proof would not even support an action for abuse of process without evidence that plaintiff had prevailed. *Erlandson v. Pullen, supra.* Filing such a suit is not outrageous conduct.

There is evidence that plaintiff was declared a suppressive person by certain individuals connected with the Mission. Plaintiff testified at trial that she knew she had been declared suppressive because that is what is done. At her deposition, she testified that someone had told her that she had been declared suppressive. However, there is no evidence that *defendants* informed plaintiff that she was declared suppressive and subject to the Fair Game policy, or knew or intended that she be so informed.[15]

The only evidence that defendants forbade, "through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff" is a document issued June 7, 1976:

> "All staff are hereby notified not to attempt to contact or interfere with JULIE CHRISTOFFERSON or PATRICK OSLER in any manner. These two persons have attacked the Church of Scientology so I repeat, they are not to be communicated to for any reason.
>
> "If either of these two contact any one in the Church, or if any associates of theirs try to contact any one of the Church, report this action * * * immediately."

This directive followed a letter sent on June 6, 1976, by an attorney on behalf of plaintiff and Osler. That letter said:

> "This office represents Julie Christofferson and Patrick Osler, formerly members of your group. Enclosed are photocopies of affidavits to the effect that they have both been deprogrammed, and that they request legal assistance should you make any effort to induce them back into

[15] At her deposition, plaintiff testified that she did not know whether she had been declared suppressive. Later, however, she said she had been told by someone that she had been declared suppressive. She stated that she could not remember who had told her, but thought it was someone who left Scientology after she did.

> the cult. Naturally, a large civil action would be an expected element of any such legal assistance. Therefore you are hereby on notice that any attempt to contact them, or to interfere with them in any manner, will result in most grave consequences to you."

In addition, a former staff member of the Mission testified that they were told at a staff meeting not to communicate or associate with plaintiff or Osler under any conditions, or if they did so, to write it up immediately.

Following, as the directive had, the letter from plaintiff's attorney demanding that defendants not contact plaintiff in any way, the orders that plaintiff's demand be met can in no way be considered outrageous conduct. There is no evidence that any threats of mental or physical harm were made to enforce the prohibition on contact with plaintiff.

The mailings of which plaintiff complains were, with one exception, from the American Saint Hill Foundation (known as ASHO) in California, a Scientology organization. Several personal letters to plaintiff, signed by individuals she did not know, asked about her progress in Scientology. Some of those letters contained brochures on Scientology. In addition, two editions of a newsletter entitled *Cause,* also published by ASHO, were received by plaintiff. Finally, plaintiff received one form letter with brochures from COSOP. Plaintiff does not seem to contend that the contents of the letters were offensive, but she testified that she was made fearful by the fact that she received mail from Scientology organizations at all. Certain of the mailings were addressed to plaintiff's last Portland address and were forwarded to her in Montana. Others were addressed to the post office box which was her Eureka, Montana, address.

Mailing letters, brochures on Scientology and a newsletter which were in themselves innocuous cannot constitute outrageous conduct. There was nothing sinister in any of the material plaintiff received. Neither was there anything mysterious about the fact that plaintiff's forwarding address was obtained, for it is clear that certain of the items were forwarded by the post office and that the envelopes contained an "address correction requested" imprint.

In addition to what was alleged in her complaint, plaintiff also presented evidence at trial, without an objection that it was outside the scope of the pleadings, of three incidents which made her fearful. Once, a couple of months after she left Scientology, she was in Portland and was walking down the street with Osler near the house in which she was staying. They noticed a car parked about a block from the house, and Osler recognized the person in the car as a Scientologist. They walked up to the car and asked the person what he was doing. He did not answer but started the car and drove away. Later that afternoon plaintiff noticed a van parked about a block from the house and, as they approached the van, it drove away. Osler recognized the person driving as a Scientologist.

Finally, in June, 1976, plaintiff and Osler were out walking and noticed two Scientologists behind them. They walked into the library and were followed into one of the library rooms. There the two Scientologists sat down at a table and stared at them while they looked at books. When they started to leave, the Scientologists got up, but plaintiff and Osler left quickly and did not see them after that. These three incidents, either singly or taken as a group, cannot conceivably be called outrageous conduct.

We have reviewed the record as it relates to the conduct which plaintiff claims to be outrageous. We recognize that plaintiff does not claim that any particular action, by itself, would constitute outrageous conduct, but rather contends that the actions together rise to the level of actionable conduct. We find as a matter of law that the conduct shown is not actionable as outrageous conduct, whether viewed as individual acts or as a course of conduct. Defendants' motions for directed verdicts on the cause of action for outrageous conduct should have been granted.

FRAUD

We turn to plaintiff's cause of action for fraud. Plaintiff's complaint contained the following allegations:

"VII

"Between July, 1975 and April, 1976, in Oregon Defendants Church of Scientology, Mission of Davis, Church of Scientology, Portland, and the Delphian Foundation made the following misrepresentations regarding

the standard, quality, grade, sponsorship, status, characteristics, ingredients, uses, benefits, character or qualities of the courses or goods offered by Defendants when they knew or should have known that such representations were false:

"*STUDENT HAT AND COMMUNICATIONS COURSE*

"(1) * * * the Church of Scientology Communication Course would provide more knowledge of the mind than is possessed by any psychologist or psychiatrist.

"(2) * * * the communication course was completed and endorsed by Father Pat Flanagan of Boys' Town, Omaha, Nebraska. * * *

"(3) * * * the communication course would help the Plaintiff in college work and that the course was offered on a money back guaranteed basis. * * *

"(4) * * * [the] student HAT course enabled a student to understand any subject better and more accurately. * * * the Student HAT Course was offered on a money back guaranteed basis.

"PLAINTIFF WAS FURTHER INDUCED TO ENGAGE IN A PROGRAM KNOWN AS AUDITING BY THE FOLLOWING REPRESENTATIONS:

"(5) * * * auditing relieves the effects of past experiences. * * * through auditing she would have more knowledge of the mind than any psychiatrist or psychologist and more knowledge of the bodily processes than any doctor.

"* * * * *.

"(a) Auditing develops creativity;

"(b) Auditing increases I.Q. scores;

"(c) Auditing cures neuroses, criminality, insanity, psychosomatic ills, homosexuality and drug dependence;

"(d) Auditing allows one to control his own emotions and the physical universe; and

"(e) Auditing was offered on a money back guaranteed basis.

"* * * * *.

"PLAINTIFF WAS INDUCED TO ENGAGE IN THE STUDY OF 'DIANETICS' BY THE FOLLOWING REPRESENTATIONS:

"(8) * * * Dianetics is scientifically provable and that it cures asthma, arthritis, rheumatism, ulcers, toothaches, pneumonia, colds, and color blindness. * * *

"(9) * * * L. Ron Hubbard, the creator of auditing, is an engineer and nuclear physicist and has a degree from

Princeton University and an honorary degree from Sequoia University and is a graduate of George Washington University who revealed Dianetics to mankind as a service to humanity, with no intent to profit therefrom. * * *

"(10) * * * L. Ron Hubbard had a civil engineering degree; a 'B.S.' degree and was a nuclear physicist, a graduate of George Washington University; and had received an honorary degree from Sequoia University and Princeton University;

"DEFENDANTS FURTHER INDUCED PLAINTIFF TO QUIT HER JOB AND LIVE AND WORK AT THE DELPHIAN FOUNDATION BY MAKING THE FOLLOWING REPRESENTATIONS:

"(11) * * * Delphian Foundation was funded by government grants for developing education and alternative energy sources; further that Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college degree.

"(12) * * * L. Ron Hubbard was a graduate of George Washington University, was an engineer and nuclear physicist and had an honorary degree from Sequoia University and that the Delphian Foundation was nearing accreditation and had almost been accredited in September of 1975; further that in the Spring of 1976 Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college degree.

"(13) * * * [Plaintiff] could attend school at the Delphian Foundation and, after such study, be able to obtain college credit hours in architecture or engineering at any college in the country merely by taking a test.

"(14) * * * [Plaintiff] would obtain at the Delphian Foundation an education superior to any University in the world.

"* * * * * *."[16]

We first consider the motions for directed verdict made by each of the parties on other than constitutional grounds. COSOP moved for a directed verdict on the ground that plaintiff had not shown that any of its agents or employes had made any of the misrepresentations alleged. COSOP argues on appeal that that motion should have been granted.

[16] Defendants do not argue that these alleged statements may not be fraudulent, at least under some circumstances.

Plaintiff's complaint alleged that the misrepresentations were made by specific individuals who were agents or employes of the Mission or Delphian. None of the individuals named is claimed to have been an agent or employe of COSOP. The complaint did allege that the misrepresentations were repeated by various employes of defendants and that they were contained in literature provided to plaintiff by COSOP. However, at trial, plaintiff did not introduce any evidence that the statements were made by employes of COSOP or that she was provided with any literature by COSOP.

There is evidence that plaintiff paid $75 to COSOP for a "Lifetime HASI" on July 30, 1975. HASI is an acronym for Hubbard Association of Scientology International. HASI membership entitles one to a 10 percent discount on purchases from all Scientology organizations. Plaintiff contends that COSOP may be held liable for the misrepresentations made by employes of the Mission, because it received money from plaintiff while knowing about the fraudulent practices employed by the Mission. She does not contend that actual knowledge was shown, but only that COSOP had constructive knowledge of the marketing practices of the Mission and of the claims that were made for the courses offered.

Assuming without deciding that COSOP could be held liable on such a basis, we find no evidence, nor has plaintiff pointed to any, to indicate that COSOP was aware on July 30, 1975, when plaintiff paid $75 for the HASI membership, that plaintiff had had any contact with the Mission at all. The only evidence regarding the $75 payment to COSOP is a receipt. Plaintiff did not testify to the circumstances surrounding that payment and, in fact, testified mistakenly that she had not paid any money to COSOP. The fact that both COSOP and the Mission are Scientology organizations does not by itself provide a sufficient link to hold COSOP liable for what may have been done by the Mission. Neither does the fact that policy letters and bulletins written by L. Ron Hubbard are espoused by both COSOP and the Mission make COSOP liable to this plaintiff.

Plaintiff has not shown that the Mission acted as an agent for COSOP, nor does she claim that such a

relationship existed. She has shown no basis upon which COSOP may be held vicariously liable for the actions of the Mission. We conclude that the motion of COSOP for a directed verdict on plaintiff's action for fraud should have been granted.

Delphian's motion for directed vedict was on the ground that none of the statements alleged by plaintiff were made by any of its agents or employes and that plaintiff had already paid the $3,000 she claims was procured by fraud long before she went to Delphian. Although the complaint alleges that certain of the misrepresentations were made or repeated by employes of Delphian, plaintiff appears to concede in her brief that there is no evidence to support that allegation. Plaintiff argues, however, that Delphian should be held liable because 1) the relationship between the Mission and Delphian was such that Delphian should be held liable; 2) Delphian confirmed certain of the misrepresentations regarding its funding, structure and courses in a data sheet given to plaintiff to read to acquaint her with Delphian when she arrived; and 3) Delphian did receive some money from plaintiff, apparently for books, and also received free labor from plaintiff while she was there.

Plaintiff does not state the theory behind her contention that the relationship between Delphian and the Mission is such that Delphian should be held liable for misrepresentations made by the Mission. The evidence she points to in support of her contention is as follows:

> "* * * Mission of Davis has a branch at Sheridan on the Foundation premises * * *, the management of Mission of Davis is centered at Sheridan * * *, and that Mission of Davis, Delphian Foundation and the Sheridan Mission all co-exist on the same property to such an intertwined extent that a memorandum was necessary to prevent confusion in writing out purchase receipts * * *. The two organizations have a common president, Martin Samuels * * *, who lives at Sheridan * * *.
>
> "Additionally, [the Mission's] representations were not made coincidentially, but as part of a policy calculated to induce members who had spent all their available funds for courses in auditing at the Mission, to work at the Delphian Foundation in return for further courses and auditing * * *."

It is not clear whether plaintiff is suggesting that the Mission acted as the agent for Delphian in making the representations or that the two corporations are in reality one entity, *i.e.*, an alter ego theory.[17] The evidence adduced at trial does not support "piercing the corporate veil" so as to permit treating the two corporations as one or as the alter ego of defendant Samuels. The memorandum to which plaintiff refers shows only that the affairs of the corporations *were* maintained separately. One shared corporate officer and shared facilities are not enough to permit such an approach. *See Howco Leasing Corp. v. Oregon Lumber Export Co.*, 283 Or 225, 228, 582 P2d 4 (1978); *Schlecht v. Equitable Builders*, 272 Or 92, 535 P3d 86 (1975); *Wakeman v. Paulson*, 257 Or 542, 480 P2d 434 (1971); *A. J. Rose & Son, Inc. v. Bd. of Funeral Dir.*, 31 Or App 537, 570 P2d 1008 (1977).[18]

We also find no evidence to support a finding that the Mission was acting as the agent of Delphian in making the alleged misrepresentations.[19] Our responsibility at this stage of the proceedings is to decide whether there is any evidence which would support a reasonable inference of agency between the Mission and Delphian. *Briggs v. Morgan*, 262 Or 17, 496 P2d 17 (1972). One essential feature of agency is the right of the principal to control over the agent. "A business organization which operates in its sole and unlimited discretion is not an agent but a principal." *Kuhns et ux v. State Tax Com.*, 223 Or 547, 555, 355 P2d 249 (1960); *and see* Restatement (Second) of Agency §§ 1, 14 (1958). There is nothing in the record before us to

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[17] Plaintiff's brief responds to Delphian's argument as follows:

"Defendants' argument presumes, erroneously, that since these misrepresentations were made by someone from 'Mission of Davis' rather than from 'Delphian Foundation,' Delphian is insulated from liability no matter how blatant the misstatements."

Plaintiff then recites the facts quoted above and concludes: "Any claim of no relationship between Mission and Delphian is absurd and contrary to all the evidence." This misses the point—the issue is not whether there was a relationship; the issue is whether that relationship was so close as to give rise to joint or vicarious liability.

[18] Because of our disposition of this issue we need not consider whether the doctrine of "piercing the corporate veil" should be applied differently, or if it may be applied at all, to religious corporations.

[19] Plaintiff does not specifically claim that there was an agency relationship.

support an inference that Delphian had any right to control the actions of the Mission or had actual control over those actions; therefore, there could be no finding of agency.

Plaintiff contends that Delphian may be held liable on the basis of the following statements contained in the data sheet which was given to plaintiff to read when she arrived at Delphian, because these statements "confirmed" the misrepresentations made by the Mission:

> "That some 'external' students be accepted for tuition in accordance with our school and university structure.
>
> "* * * * *
>
> "That funding shall be by donations and endowments and by grants for specific projects, and that the full definition of allowable income routes be obtained and used.
>
> "* * * * *
>
> "That apprenticeships be a standard part of any educational program.
>
> "* * * * *
>
> "That there be a designated faculty, both for primary/secondary school and for the University.
>
> "* * * * *
>
> "That the formal structure of a university be created and maintained, and a program leading to accreditation be developed.
>
> "* * * * *
>
> "That special attention be given to the maintenance of ethical relationships and exchanges among the dynamics of TDF; this shall be the guiding principle behind decisions as to techniques and orientations in architecture, agriculture, forestry, utilities, etc. * * *"

The statements quoted above are contained under a heading "Policies." Plaintiff does not seem to claim that these are misrepresentations in themselves, and they could not fairly be construed as such. There is no evidence to suggest that they were not the policies of Delphian; neither do the statements show a connection between Delphian and the Mission sufficient to permit a finding of agency or an alter ego situation. They do not aid plaintiff.

Finally, plaintiff argues from the fact that Delphian received some money from plaintiff and also received the benefit of her free labor that Delphian can be held liable for misrepresentations made by the Mission. As with

the COSOP motion, we need not decide if that is a viable theory of recovery because, at the close of all the evidence, the trial court struck plaintiff's claim that Delphian had received free labor and was paid money by plaintiff. Plaintiff has not contended here that that was error.

We conclude that there is no basis in this record for holding Delphian liable for any misrepresentations made to plaintiff and that its motion for directed verdict should have been granted.[20]

Defendant Samuels' motion for directed verdict was based on the ground that he had not participated in the alleged fraud and could not be held liable to plaintiff merely because he is the president of the Mission. The Oregon Supreme Court held in *Osborne v. Hay*, 284 Or 133, 145-46, 585 P2d 674 (1978), that

> "* * * in order to hold the officer of a corporation personally liable for fraud by an agent or employee of the corporation it is necessary to show that the officer had knowledge of the fraud, either actual or imputed, or that he personally participated in the fraud. *See McFarland v. Carlsbad Sanitorium Co.*, 68 Or 530, 536-537, 137 P 209 (1914), and *Hoff v. Peninsula Drainage Dist.*, 172 Or 630, 643, 143 P2d 471 (1943)." *And see McDonough v. Jones*, 48 Or App 785, 617 P2d 948 (1980), *rev den* 290 Or 652 (1981).

There is evidence in the record from which a jury could have found that Samuels had knowledge of at least some of the alleged misrepresentations. It was not error to deny his motion for directed verdict on that basis.[21]

The Mission asserted only constitutional grounds for its motion. Not all of the alleged representations are

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[20] Delphian argues that plaintiff had already paid all the money she claims to have paid before she had any contact with Delphian and that, therefore, there is no causative link between plaintiff's damages and anything Delphian may have done. Plaintiff did buy some books while at Delphian, but it is not clear whether the amount she spent for those books is included in the amount of damages she claims. Plaintiff's complaint claimed that she was induced to pay the defendants $3,000.20. The receipts that plaintiff introduced at trial add up to something more than that figure.

[21] Samuels is alleged to be liable only because he is resident of the Mission and Delphian. His liability, therefore, is limited by the liability of the Mission. In the remainder of this opinion the term defendants refers to the Mission and Samuels.

claimed to be religious and therefore the motion was properly denied.[22]

FREE EXERCISE CLAUSE DEFENSE

We now consider the appropriate procedures for dealing with a defense to an action for fraud based on the Free Exercise Clause of the First Amendment.[23] Defendants made a pretrial motion to exclude from the trial "any evidence regarding the validity or sincerity of defendants' religious beliefs and practices." In the alternative, they asked for a hearing

> "* * * to determine whether the courses, training, studies, and counseling constitute a part of the religious beliefs and practices of defendants' religious organizations and are thus protected from inquiry as to their validity or sincerity by the Oregon and United States constitutions and applicable law interpretive thereof."

That motion was denied. At the close of the evidence, defendants moved to strike on various grounds certain of the specifications of fraudulant statements. As part of that motion, defendants moved to strike and withdraw from the jury all allegations regarding the communications course, the Student HAT course, auditing and Dianetics on the ground that they constitute religious practices of the defendants. That motion was also denied. Defendants assign error to the denial of both motions. As we will explain hereafter, the pretrial motion was premature, but the motion at the close of all the evidence properly presented the question for the trial court's consideration.

A defense based on the Free Exercise Clause presents particular difficulties in an action for fraud. To establish fraud, a plaintiff must ordinarily prove that the representations made were false. *See Meader v. Francis Ford, Inc.*, 286 Or 451, 595 P2d 480 (1979). However, when

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[22] Defendants claim that the statements regarding the communications course, the Student HAT course, Dianetics and auditing are protected. They do not claim that the statements concerning Delphian or the statements regarding Hubbard's educational background are religious.

[23] Defendants rely on both the United States and the Oregon constitutions for their defense. They do not, however, argue that the scope of the Oregon constitution differs materially from that of the federal constitution and, therefore, we refer only to the First Amendment of the federal constitution in discussing this defense.

religious beliefs and doctrines are involved, the truth or falsity of such religious beliefs or doctrines may not be submitted for determination by a jury. *See United States v. Ballard,* 322 US 78, S Ct 882, 88 L Ed 1148 (1944). The Supreme Court there stated:

> "* * * Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette,* 319 US 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake the task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania,* 319 US 105. As stated in *Davis v. Beason,* 133 US 333, 342, 'With man's relations to his Maker and the obligations he may think they impose, and the manner

> in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.'" 322 US at 86-87.

Defendants here were asking by both motions that the trial court determine which of the alleged misrepresentations were religious and withdraw from the jury the issue of the truth or falsity of those statements. Rather than make that determination, the trial court submitted to the jury the question of whether the statements were religious, with instructions that it was not to determine the truth or falsity of any statements it found to be religious.[24]

Defendants and amici argue that it is the responsibility of the trial court to determine in the first instance the religious character of statements alleged to be fraudulent and that, if it is determined that the statements relate to religious beliefs or practices, further inquiry is forbidden. They argue that submission of the question to a jury makes the determination one that is not reviewable after a general verdict, leaving the possibility that a defendant's adherence to unpopular or unorthodox religious beliefs could be made the basis for liability. Plaintiff argues, on the other hand, that it is appropriate for the trial court to determine which statements are religious only if it can do so as a matter of law. She contends that, if the determination requires resolution of questions of fact, that resolution is for the jury. Plaintiff further contends that the courses and practices in which she participated were held out to her as secular and that she therefore is entitled to have a jury consider the allegedly fraudulent statements, because they were not religious in the context in which they were made.

Courts have had little occasion to consider the application of a Free Exercise Clause defense in an action for fraud in a jury trial. By far the majority of the cases in this area have been non-jury cases. We have found no cases which have considered this specific issue, and none have been cited to us. In fact, there has been little discussion in

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[24] Defendants also assign error to the instruction given on the Free Exercise defense and to the failure of the trial court to give certain requested instructions. We consider those assignments *infra*.

even a general way of whether an action or statement is religious is a question of law or of fact. In practice, the issue has been treated as one of fact by many courts, without discussion. *See, e.g., Fiedler v. Marumsco Christian Sch.*, 631 F2d 1144 (4th Cir 1980); *Brown v. Dade Christian Schools, Inc.*, 556 F2d 310 (5th Cir 1977); *United States v. Carroll*, 567 F2d 955 (10th Cir 1977), *but see United States v. Silberman*, 464 F Supp 866 (MD Fla 1979); *People v. Mullins*, 50 Cal App 3d 61, 123 Cal Rptr 201 (1975).

In *Founding Church of Scientology v. United States*, 409 F2d 1146 (DC Cir 1969), a false labeling case, the court directed that, if a new trial were to follow its remand of the case to district court,

> "* * * it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determination of whether it is a label for the device in question and whether it is false." (Footnote omitted.) 409 F2d at 1165.

On remand, the district court interpreted this admonition to mean that the trial court should remove from the jury's consideration only those items which made "purely religious" appeals,

> "* * * reserving a presentation of the other literature for determination under instructions differentiating the secular from the religious." *United States v. Article or Device, Etc.*, 333 F Supp 357, 361 (DDC 1971).

We agree with and adopt this approach.[25]

The jury is the usual trier of fact in tort cases such as the one before us. Disputes in the evidence should be resolved by the trier of fact. We conclude that the trial court was required to determine the religious character of the alleged misrepresentations only if it could do so as a matter of law, that is, if there was only one conclusion to be drawn from the evidence. We now turn to that question.

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[25] Although in *Wisconsin v. Yoder*, 406 US 205, 92 S Ct 1526, 32 L Ed 2d 15 (1972), the Supreme Court seemed to undertake to determine on its own, from the record in the case, whether the Amish parents who refused to send their children to secondary school were acting on the basis of religious conviction, 406 US at 215-16, the good faith religious belief of the parents was not questioned by the state. There was no fact dispute to be resolved.

The fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be "religious." *Wisconsin v. Yoder,* 406 US 205, 215-16, 92 S Ct 1526, 32 L Ed 2d 15 (1972). The Mission claims that Scientology is a religion and that statements regarding its beliefs and practices are protected.[26] Plaintiff does not contend that Scientology is *not* a religion, but instead concentrates on the particular representations at issue. She contends that those representations are not religious statements, no matter what the status of Scientology, and that the statements are therefore not protected by the First Amendment.

Plaintiff's approach to this case has been to treat the alleged statements by defendants *in vacuo,* but we do not believe that it is constitutionally permissible to approach them that way. In this case, the issue of whether the allegedly fraudulent statements are entitled to the protection of the First Amendment involves several questions. Statements made by religious bodies must be viewed in the light of the doctrines of that religion. Courts may not sift through the teachings of a religion and pick out individual statements for scrutiny, deciding whether each standing alone is religious. While plaintiff has skipped past the issue of whether Scientology is a religion, we do not believe we can do so, because the answer to that question is pertinent to, although not dispositive of, the determination of whether the statements made by the agents of the Mission are religious.

The Supreme Court stated in *Wisconsin v. Yoder, supra,*

> "* * * Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." 406 US at 215-16. (Footnote omitted.)

And, as noted by the court in *Founding Church of Scientology v. United States, supra:*

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[26] Because defendant Samuels is only sought to be held liable only as president of the Mission, we look to the protection afforded the Mission. Samuels may be held only to the extent the Mission is liable.

"* * * Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred. When tax exemptions are granted to churches, litigation concerning what is or is not a church will follow. When exemption from military service is granted to those who object on religious grounds, there is similar litigation. When otherwise proscribed substances are permitted to be used for purposes of worship, worship must be defined. The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes. * * *" 409 F2d 1160.

Without attempting an "unprecedented definition of religion," *Malnak v. Yogi,* 440 F Supp 1284, 1320 (DNJ 1977), *aff'd,* 592 F2d 197 (3d Cir 1979), we draw guidance from the case law. We find that, while beliefs relating to the existence of, and man's relationship to, a God are certainly religious, belief in a traditional, or any, "god" is not a prerequisite to a finding that a belief is religious. *Torcaso v. Watkins,* 367 US 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961); *Everson v. Board of Education,* 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1947); *Washington Ethical Soc. v. District of Columbia,* 249 F2d 127 (DC Cir 1957); *Malnak v. Yogi, supra; Fellowship of Humanity v. County of Alameda, supra.* Neither does the fact that Scientology is of relatively recent origin mean that it is not entitled to the protection of the First Amendment. *See Loney v. Scurr,* 474 F Supp 1186 (SD Iowa 1979); *Malnak v. Yogi, supra; Remmers v. Brewer,* 361 F Supp 537 (SD Iowa 1973); *see also United States v. Ballard, supra; Founding Church of Scientology v. United States, supra.* On the other hand,

"[a] way of life, however, virtuous and admirable, [is not entitled to First Amendment protection] if based on purely secular considerations.

"* * * * *

"Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the

demands of the Religion Clauses." *Wisconsin v. Yoder, supra,* 406 US at 215-16; *see also, United States v. Seeger,* 380 US 163, 176, 85 S Ct 850, 13 L Ed 2d 733 (1965); and *see Welsh v. United States,* 398 US 333, 90 S Ct 1792, 26 L Ed 2d 308 (1970).

Courts may not, of course, judge the "truth" or "falsity" of the beliefs espoused by a group in determining its status as a religion; the inquiry here is simply whether the teachings of Scientology are of the *type* that qualify for the protection of the Free Exercise Clause. The record in this case demonstrates indisputably that they are. Although certain of the theories espoused by Scientology appear to be more psychological than religious, we cannot dissect the body of beliefs into individual components. It seems clear that if defendants sought to teach Scientology in the public schools in this country, they would be prohibited from doing so by reason of the Establishment Clause of the First Amendment. *See Malnak v. Yogi, supra; Epperson v. Arkansas,* 393 US 97, 89 S Ct 266, 21 L Ed 2d 228 (1968). The theories of Hubbard are interrelated and involve a theory of the nature of the person and of the individual's relationship with the universe. *See Founding Church of Scientology v. United States,* 409 F2d at 1160.

The Mission is incorporated as a tax-exempt religious organization; it has ordained ministers and characterizes itself as a church. It has a system of beliefs, or creed, which encompasses beliefs which are religious in character. We conclude that Scientology is a religion and that the Mission is a religious organization entitled to invoke the protection of the Free Exercise Clause.

The second inquiry to be made in determining whether the statements at issue are protected is whether those statements relate to the religious beliefs and practices of the Mission. It is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud. *See Founding Church of Scientology v. United States, supra; see also Cantwell v. Connecticut,* 310 US 296, 60 S Ct 900, 84 L Ed 1213 (1940). If the statements involved here do not concern the religious beliefs and practices of the Mission, the Free Exercise Clause provides no defense to plaintiff's action.

Defendant presented evidence that the courses and auditing in which plaintiff participated, and about which the alleged misrepresentations were made, were part of the religious beliefs and practices of Scientology. Plaintiff did not, and does not, contest that fact.

The final inquiry involved in determining whether the alleged misrepresentations are protected by the First Amendment is whether the statements, although made on behalf of a religious organization and having a religious character, were nonetheless made for a wholly secular purpose. Although we find that it has been established in this record that Scientology is a religion, that the Mission is a religious organization and that the statements which are claimed to be religious relate to religious beliefs and practices of Scientology, plaintiff did present evidence that the courses and auditing she received were offered to her on an entirely secular basis for self-improvement, thereby creating a jury issue as to that matter. Plaintiff testified that she was told that the term "religion" and "church" were used only for public relations purposes. She also presented testimony from a former Mission staff member that the staff was instructed to avoid the issue of religion when attempting to interest someone in Scientology and that, if pressed, they were to say that it is not a religion.[27]

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[27] It is suggested in Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 Yale LJ 593, 604 (1964), that

> "Because religion can be in conflict with other disciplines, because it cuts across everyday life, we can only know that a claim is based on religion when we are told that it is. The legal basis for stating that a claim is in the religious domain can be that it is held out as being religious in nature.
>
> "* * * * *
>
> "Since the Constitution prohibits defining an area of belief as 'religious,' a man must make it clear that the beliefs he represents are 'religious' if he wants to be free to express them under the constitutional warrant of freedom of religious belief. He has the burden of communicating that he speaks only from the authority of religion. But, once such a burden has been met, then we cannot attack the particular aspects of his faith as fraudulent.
>
> "* * * * *
>
> "What a man presents as a religious claim, then, cannot be attacked. It is only when he makes a representation beyond religious authority that we can apply laws of fraud."

As attractive as this analysis may be, we do not believe that it has been the approach taken by the courts in considering claims for protection under the First

There is, on the other hand, evidence that plaintiff joined the Church of Scientology and that she was told that the courses and practices were religious in nature. Many of the materials which she read contained a statement inside the front cover which indicated that Scientology is a religion, that auditing is a religious practice and that the E-meter is a religious artifact.[28]

In *United States v. Article or Device, Etc., supra,* 333 F Supp at 363-365, the district court, sitting without a jury, found that Scientology services were offered on both a religious and a secular basis and that the E-meter was misbranded because much of the literature explaining its use and expounding on its value was presented in an entirely non-religious context. The court recognized that complete condemnation of the E-meter would encroach upon the religious freedom of those who used the device as a religious artifact. It therefore ordered the device condemned with the provision that it could be distributed only for use in bona fide religious counseling. This case differs from *United States v. Article or Device, Etc., supra,* in that the court there pointed out that there were organizations other than the Founding Church of Scientology that were using the E- meter and offering auditing services. It was the use of the E-meter by the secular organizations which the court forbade. The court did not consider whether use *by the Church* could be on a secular as well as on a religious basis. We believe that such a possibility exists.

There are certainly ideas which may only be classified as religious. Statements regarding the nature of a supreme being, the value of prayer and worship are such statements. There are also, however, statements which are

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Amendment. As in *Welsh v. United States, supra,* and *Malnak v. Yogi, supra,* the proponents of a particular doctrine may unwittingly fail to define as "religious" what is, in fact, constitutionally protected as such.

[28] It is clear that in the context of the Establishment Clause the characterization of the activity as non-religious is not a determinative factor. *See Malnak v. Yogi, supra; see also Engel v. Vitale,* 370 US 421, 82 S Ct 1262, 8 L Ed 2d 601, 86 ALR2d 1285 (1962); *Torcaso v. Watkins,* 367 US 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961); *Welsh v. United States, supra.* On the other hand, the characterization of beliefs as religious by one seeking the protection of the Free Exercise Clause is not determinative either. *See Wisconsin v. Yoder, supra,* 406 US at 215-16; *Founding Church of Scientology v. United States, supra; People v. Woody, supra; United States v. Kuch,* 288 F Supp 439 (DDC 1968).

religious only because those espousing them make them for a religious purpose. The statements which are alleged by plaintiff to be misrepresentations in this case are not of the type which must always and in every context be considered religious as a matter of law.

We have found that it is established in this case that the Mission is a religious organization and that Scientology is a religion. Plaintiff does not dispute the claim that the courses and auditing she received are part of the religious beliefs and practices of Scientology. It is also uncontroverted that plaintiff applied to join the Church of Scientology, Mission of Davis, before taking any of the courses offered. These facts may be highly persuasive evidence of the contention that the courses and auditing plaintiff received were religious in nature and that the statements made regarding their nature and efficacy were religious statements. There is, however, conflicting evidence which the jury was entitled to consider. Plaintiff presented evidence from which it could be concluded that the courses and auditing were also offered on a wholly secular basis. Because the statements were not *necessarily* religious, plaintiff was entitled to have a jury consider, under proper instructions, the question of whether the statments were made for a wholly non-religious purpose. The trial court was correct, therefore, in refusing to rule before trial as to whether these alleged statements were religious. It was likewise correct in refusing to withdraw the statements from the jury's consideration.

We turn now to the question of the proper instructions to be given the jury in considering the allegations of fraud in this context.

FIRST AMENDMENT INSTRUCTION

Defendants objected to the giving of the following instruction regarding the First Amendment defense:

> "The defendants have asserted as an affirmative defense that the Constitutions of the United States and the State of Oregon provide that religious beliefs and doctrines may not be questioned for truth or falsity. To establish this defense, defendants must prove that each of the acts or representations complained of were religious in nature and were held out as such to plaintiff.

> "They must further prove that if the acts and representations complained of were held out as religious in nature, that they were held out by defendants as good faith religious beliefs and doctrine. Therefore, if you find that the acts or representations complained of were acts or representations religious in nature and held out as such, and held in good faith belief, then you may not inquire into the truth or falsity of such acts or representations. Your inquiry must end and your verdict shall be for the defendants. However, should you determine that any of the acts or representaitons complained of were not religious in nature or were not held out as such to the plaintiff, or were not held to be such in good faith, then you may determine the truth or falsity of such acts or representations."

We find the instruction to be an inaccurate statement of the law as it applies to this case and conclude that reversal of the judgment on the fraud cause of action is required.

Defendants first object to the submission to the jury of the question of the religious nature of the statements. That submission was not error. However, the directions for determination of that issue were erroneous. This record establishes that Scientology is a religion and that the Mission is a religious organization. It also establishes that the courses and auditing which plaintiff was induced to participate in are part of the religious beliefs and practices of the Scientology. The Mission is, therefore, entitled to the protection of the First Amendment for statements regarding its religious beliefs and practices unless it is shown that the statements made were part of an offer of those services to the public on a wholly secular basis. The reasonable inference to be drawn from the instruction as given is that a determination should be made for each of the alleged misrepresentations as to whether it was religious and whether it was held out to plaintiff as religious in nature. This fragments the inquiry inappropriately. The question which the jury was required to decide in this case was whether, even though the Mission is a religious organization, it offered the services in question here on a wholly non-religious basis. *See Founding Church of Scientology v. United States, supra.* It is only upon an affirmative finding on that issue that liability can attach for the statements made in this case. The jury was not correctly instructed in that regard.

In addition, the instruction that the statements must be held out as religious in good faith is not accurate. The question of "good faith" belief is quite complicated in this case, for the defendants charged with fraud are not the individuals who made the representations, but the religious organizations themselves. It is true that in many cases in which free exercise protection has been sought, courts have looked to whether the one seeking the protection is "sincere" in his or her belief in the doctrine at issue. *See, e.g., People v. Woody, supra; Teterud v. Burnes,* 522 F2d 357 (8th Cir 1975). Those cases, however, involve the sincerity of the *individual* claiming the protection.

United States v. Ballard, supra, has been cited to us for the proposition that the sincerity of the proponents of religious belief is a proper subject for inquiry in an action for fraud. We do not read *Ballard* so to hold. In *Ballard,* a criminal action for mail fraud, the parties agreed in the trial court that the issue of the truth or falsity of the statements at issue would not be submitted to the jury, but only the question of whether the defendants honestly and sincerely believed the statements they made. After a jury verdict finding them guilty, the defendants contended that it was improper to withdraw from the jury the question of whether the statements made were true or false. The Circuit Court of Appeals agreed and reversed the conviction. On appeal, the Supreme Court held that "* * * the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of [the defendants]." The Court then noted that the defendants urged other grounds for supporting the reversal of the convictions, but it refused to consider those contentions before giving the circuit court an opportunity to consider the issues first. 322 US at 88. *Ballard* did not address the question of the propriety of submitting the issue of the defendants' sincerity to the jury. In addition, the defendants in *Ballard* were the very individuals accused of actually making the statements at issue. The liability of a religious organization for the statements of its agents was not discussed.

In the situation presented here, it is difficult to determine *whose* sincerity or good faith the jury could be asked to determine. Is the religious organization to be held

liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?

In *Founding Church of Scientology v. United States, supra,* the court suggested that liability might attach if it were shown

> "* * * that an item (book, pamphlet, advertising flier) makes out a self-sufficient non-religious claim for Scientology services, *to which a religious appeal has been merely tacked on.*" 409 F2d at 1165. (Emphasis supplied.)

As we have indicated, defendants could be held liable if the jury found that the courses and services offered by the Mission to plaintiff were offered for a wholly secular purpose. A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were made for a purpose other than inducing plaintiff to join or participate in defendants' religion. A wholly secular purpose, in this regard, would include, but not be limited to, the intention solely to obtain money from plaintiff. On this record it would have been proper to instruct the jury that it is possible to find that the services were offered on a wholly secular basis, notwithstanding the fact that plaintiff was required to join the Church of Scientology in order to participate and that the materials she was given to read stated that Scientology is a religion. A jury could find that the courses and services were offered on a secular basis and that a religious designation had been merely "tacked on." Phrasing the issue as one of good faith was therefore misleading and erroneous.

Defendants also contend that the instruction improperly placed on them the burden of proof on the question of the religious nature of the representations. They contend that it was improper to require that they prove the statements were religious when it was plaintiff's burden to prove knowledge of falsity to recover for fraud. Defendants confuse the burden of proving fraud with the burden of proving the affirmative defense of freedom of religion. As this instruction indicates, it is appropriate for the jury to consider the matter of the defense first, before reaching the issue of the truth or falsity of the statements

for deciding the issue of fraud. That approach makes good sense in this context.

In summary, we conclude that the motions of all defendants for directed verdicts on the claims for outrageous conduct should have been granted. The motions of COSOP and Delphian for directed verdicts on plaintiff's action for fraud should have also been granted. The instruction which was given regarding the Free Exercise defense asserted by the remaining defendants was erroneous and requires reversal.

Because of the disposition we have made of the causes of action and counts, this case will have to be retried. We now turn to the assignments of error which raise issues which are likely to arise on re-trial.

EXHIBITS

Defendants assign error to the exclusion of three exhibits offered to show the good faith of the individual who informed plaintiff that L. Ron Hubbard had an honorary degree from Sequoia University and a degree from Princeton University. Those exhibits were photocopies of a telegram and two certificates. Plaintiff objected to the exhibits on the grounds of lack of authentication and hearsay. The objections were sustained. Those objections were not well taken. The exhibits were offered to show the state of mind of the individual who made the representations regarding Hubbard's background to plaintiff. That individual testified that he had seen the exhibits before talking with plaintiff and believed them to be true. Neither the truth of the matter contained in the exhibits nor their authenticity was asserted by defendants. The state of mind of the one accused of making fraudulent representations is clearly at issue where one of the elements to be shown is the speaker's knowledge of the falsity of the representation being made. *See Linebaugh v. Portland Mortgage Co.*, 116 Or 1, 239 P 196 (1925); *Seaside, City of v. Randles*, 92 Or 650, 180 P 319 (1919). The exhibits were relevant to that state of mind, and their exclusion was error.

INSTRUCTIONS

Defendants assign error to the giving of certain instructions and the failure to give other instructions. The

first assignment we consider is the failure of the trial court to give defendants' requested instruction defining "justifiable reliance" as follows:

> "A party claiming to have been defrauded by a false representation must not only have acted in reliance thereon, but must have been jusified in such reliance, that is, the situation must have been such as to make it reasonable for him, in the light of the circumstances and his intelligence, experience and knowledge, to accept the representation without making an independent inquiry or investigation."

The court instructed the jury that to find for plaintiff it must find that "* * * the plaintiff having a right to do so, reasonably relied upon the representation and did not know it was false." We believe the instruction given by the trial court "adequately and accurately state the applicable law." *Bowlds v. Taggesell Pontiac,* 245 Or 86, 95, 419 P2d 414 (1966); *see also Yardley v. Rucker Brothers Trucking, Inc.,* 42 Or App 239, 600 P2d 485 (1979), *rev den* 288 Or 335 (1980). It was not error for the trial court to refuse to give the instruction requested by defendants.

Defendants also assign error to the failure to give their requested instruction defining "material fact." The court instructed the jury that there must have been "a false representation of material fact" in order to find for the plaintiff on her fraud claim. Defendants requested the following instruction defining "material fact":

> "A fact is material if a reasonably prudent person under the circumstances would attach importance to it in determining his course of action."

Plaintiff does not contend that this instruction is an incorrect statement of the law, but only that it was unnecessary to instruct the jury on the meaning of the term material because that term was used in its usual and conventional sense. We disagree that the instruction was unnecessary. The term "material fact," as it is used as an element of an action for fraud, involves the kind of objective standard included in the requested instruction. *See Milliken v. Green,* 283 Or 283, 583 P2d 548 (1978). The dictionary definition of "material," "being of real importance or great consequence," Webster's Third International Dictionary, does not contain that objective element.

Defendants were entitled to have the jury instructed on the definition of the term which constitutes an element of the action against which they were defending.

Defendants also contend that the trial court erred in failing to instruct the jury that "fraud is never presumed." Within the context of the instructions as a whole, *see Yardley v. Rucker Brothers Trucking, Inc., supra,* we believe the jury was adequately instructed in that regard, and the failure to give the instruction was not error.

Defendants assign error to the failure to give their requested instructions containing the specific language of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 3 of the Oregon Constitution.[29] The refusal to give such instructions was not error. The language of the constitutional provisions is not by itself a statement of the law which was necessary or even particularly helpful to the jury in resolving the issues in this case. Although it might not have been error to give such an instruction, neither was it error to refuse to do so.

Finally, defendants assign error to the refusal to give the following instruction:

> "The parties have stipulated that Scientology is a religion. I instruct you that for all purposes in this case Scientology is a religion and the Church of Scientology, Mission of Davis, and Church of Scientology of Portland are religious institutions."

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[29] Defendants' requested instructions were as follows:

"The First Amendment to the United States Constitution provides that: 'Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.'

"The Fourteenth Amendment to the United States Constitution provides that: '* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.'

"Article I, Section 2 of the Oregon Constitution provides under Freedom of Worship: 'All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences.'

"Article I, Section 3 of the Oregon Constitution under Freedom of Religious Opinion provides: 'No law shall in any case whatever, control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience.'"

The first portion of their requested instruction is not correct. Plaintiff did not stipulate that Scientology is a religion. She chose to approach the problems presented in this litigation on the basis that it did not matter whether Scientology is a religion, because the defendants could be liable in any event. That does not amount to a stipulation that Scientology is a religion. However, we have determined that the record in this case established, as a matter of law, that Scientology is a religion. The jury should have been so informed.

PUNITIVE DAMAGES

The final assignment of error we consider[30] is the failure of the trial court, on motion by defendants, to withdraw from the jury the claim for punitive damages. In the trial court and in this court defendants rely on *Wheeler v. Green*, 286 Or 99, 593 P2d 777 (1979), for the proposition that imposition of punitive damages is constitutionally impermissible in the context of free speech.[31] Defendants contend that that proposition also applies to the area of free exercise of religion and that statements arguably religious should not subject one to liability for punitive damages because of the "chilling effect" such awards could have on the practice of religion. They make only constitutional arguments and do not argue that the case is otherwise inappropriate for an award of punitive damages.

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[30] Defendants' other assignments of error are either mooted by our disposition of the issues we have discussed, were not preserved in the trial court, or are, in our estimation, unlikely to arise again on re-trial.

[31] *Wheeler v. Green, supra*, is based on the Oregon Constitution. Defendants also rely on *Gertz v. Robert Welch, Inc.*, 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974), for the proposition that punitive damages are constitutionally impermissible for defamation. *Gertz*, however, does not hold that punitive damages may never be awarded for defamation. The Court was concerned with the self-censorship of media defendants which might result from the possibility of punitive damage awards under state laws requiring less than a showing of actual malice. The Court stated:

> "We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. * * * In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times [*Co. v. Sullivan*, 376 US 254, 84 S Ct 710, 11 L Ed 2d 686, 95 ALR2d 1412 (1964), that is 'actual malice'] may recover only such damages as are sufficient to compensate him for actual injury." 418 US at 350.

After the briefs in this case were submitted, the Oregon Supreme Court decided *Hall v. May Department Stores Co., supra,* in which it held that punitive damages are not available in an action for outrageous conduct in which the only conduct which subjects the defendant to liability is "speech." The court stated:

> "When the cause of defendant's liability is his 'abuse' of speech and expression, as in the case of defamation, *Wheeler v. Green* holds that the 'responsibility for the abuse' is confined to civil liability for compensation only. Here the injury was to plaintiff's person rather than her reputation, but as long as it resulted from an 'abuse' of speech only, the principle is the same." 292 Or at 146.

It might well be argued on the basis of the above language that any fraud which involves an abuse of speech or expression is similarly exempt from the imposition of punitive damages. The Supreme Court has, however, recognized the possibility of an award of punitive damages in cases involving fraud in several recent opinions. *See, e.g., Schmidt v. Pine Tree Land Dev.,* 291 Or 462, 631 P2d 1373 (1981); *Milliken v. Green, supra; Green v. Uncle Don's Mobile City,* 279 Or 425, 568 P2d 1375 (1977). Although we are not certain just what the analytical distinction is, given the broad language in *Hall,* we do not believe that the Supreme Court intended to prohibit the award of punitive damages in all cases of fraud, and we decline to do so here.

Defendants, arguing without "benefit" of *Hall,* do not claim that all fraud is exempt from the imposition of punitive damages, but that "* * * in the sensitive area of First Amendment freedoms, a plaintiff can recover only compensatory damages." They contend that the imposition of punitive damages would have a chilling effect, not only on the exercise of free speech and association, but on the free exercise of religion as well.

As we have stated, we do not agree that punitive damages are unavailable for fraud merely because the fraudulent representations are "speech." Defendants suggest that because the actions giving rise to this cause of action occurred in the context of a religious organization of which plaintiff was a member, the free exercise of religion would be chilled by the possibility of a punitive damage award. We do not believe that such a chilling effect is a

threat to the free exercise of religion. In order to be actionable at all, the statements alleged must be found to have been *non-religious* as made. Defendants' argument seems to lead to is the conclusion that religious organizations should not be made liable for punitive damages because they are religious organizations, even if the content of the statements which they are alleged to have made is not religious. We find no constitutional requirement for such an exemption. The free exercise of religion is sufficiently protected by the the broad scope of what *is* protected as religious belief and practice and the fact that the truth or falsity of such religious beliefs may not be determined in an action for fraud. The trial court properly denied defendants' motion to strike the claim for punitive damages.

Reversed as to defendants Church of Scientology of Portland and Delphian Foundation; reversed and remanded for a new trial as to defendants Samuels and Church of Scientology, Mission of Davis.

APPENDIX B

Orders of the Court of Appeals Denying Applications for Rehearing or Reconsideration

[Letterhead of Court of Appeals, Salem, Oregon]

June 14, 1982

Charles J. Merten
Attorney at Law
117 S.W. Taylor, Suite C
Portland, Oregon 97204

Leonard Boudin
Attorney at Law
30 East 42nd Street
New York, N.Y.

Re: Christofferson v. Church of Scientology of Portland CA 15952 SC 28705

Dear Counsel:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on June 10, 1982 decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition.

Sincerely,

CAROL JUSTIS
Carol Justis
Records Administrator

CJ:np

cc: Timothy Bowles
Garry P. McMurry
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby

[Letterhead of Court of Appeals, Salem, Oregon]

June 14, 1982

Garry P. McMurry
Attorney at Law
1600 Benj. Franklin Plaza
Portland, Oregon 97258

William T. Powers
Attorney at Law
1300 S.W. Fifth, Suite 3008
Portland, Oregon 97201

Re: Christofferson v. Church of Scientology of Portland A15952 SC 28702

Dear Counsel:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on June 10, 1982 decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition.

Sincerely,

Carol Justis
Records Administrator

CJ:np

cc: Charles J. Merten
Leonard Boudin
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby

APPENDIX C

Orders of the Supreme Court of Oregon Denying the Petitions for Review

[Letterhead of Court of Appeals, Salem, Oregon]

July 29, 1982

Charles J. Merten
Merten & Fink
117 SW Taylor, Suite C
Portland, OR 97204

Emily Bass
Rabinowitz, Boudin, Standard, Krinksky & Liberman
30 East 42nd Street
New York, New York 10017

Re: CHRISTOFFERSON V. CHURCH OF SCIENTOLOGY OF PORTLAND CA 15952 SC 28705

Dear Counsel:

The Supreme Court on July 27, 1982 denied petitioners' Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

MARILYN HARTLEY
Marilyn Hartley
Supreme Court Calendar Clerk

Note: Justice Roberts disqualified

MH/
cc: Timothy Bowles
Garry P. McMurry
William T. Powers
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby

C2

[Letterhead of Court of Appeals, Salem, Oregon]

July 29, 1982

Gary P. McMurry
Rankin, McMurry, VavRosky & Doherty
1600 Benj. Franklin Plaza
One SW Columbia
Portland, OR 97258

William T. Powers
Powers & Powers
1300 SW Fifth, Suite 3008
Portland, OR 97201

Re: CHRISTOFFERSON V. CHURCH OF SCIENTOLOGY OF PORTLAND CA 15952 SC 28702

Dear Counsel:

The Supreme Court on July 27, 1982 denied respondent's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

MARILYN HARTLEY
Marilyn Hartley
Supreme Court Calendar Clerk

NOTE: ROBERTS, J., DISQUALIFIED

MH/
cc: Charles J. Merten
Emily Bass
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby
Timothy Bowles

APPENDIX D

Orders of the Supreme Court of Oregon Denying the Petitions for Rehearing of the Denials of the Petitions for Review.

[Letterhead of Court of Appeals, Salem, Oregon]

September 22, 1982

Charles J. Merten
Richard S. Yugler
Merten & Fink
117 SW Taylor, Suite C
Portland, OR 97204

Re: Christofferson v. Church of Scientology of Portland CA 15952 SC 28705

Dear Counsel:

The Supreme Court on September 21, 1982, denied defendants' petition for rehearing in the above-entitled matter.

Very truly yours,

MARILYN HARTLEY
Marilyn Hartley
Supreme Court Calendar Clerk

mh

cc—Leonard Boudin
Emily Bass
Eric Lieberman
Timothy Bowles
Garry P. McMurry
Patric J. Doherty
William T. Powers
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby

D2

[Letterhead of Court of Appeals, Salem, Oregon]

Garry P. McMurry
Rankin, McMurry, VavRosky & Doherty
1600 Benjamin Franklin Plaza
Portland, OR 97258

Re: Christofferson v. Church of Scientology of Portland CA 15952 SC 28702

Dear Mr. McMurry:

The Supreme Court on September 21, 1982, denied respondent Julie Christofferson's petition for rehearing in the above-entitled matter.

Very truly yours,

MH
Marilyn Hartley
Supreme Court Calendar Clerk

mh

cc—William T. Powers
Charles J. Merten
Leonard Boudin
Emily M. Bass
Lawrence Stern
Elden M. Rosenthal
Leslie M. Roberts
Lee Boothby
James K. Hopps
Robert W. Mixon

APPENDIX E

Similar Cases Raising Claims of Religious Fraud, Mind Control, And/Or Brainwashing

I. CASES AGAINST THE CHURCH OF SCIENTOLOGY

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
1. PETERSON v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., Central District of California, Case No. CV 81-3259-CBM	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion for summary judgment on First Amendment grounds is pending.
2. GARRITY v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., Central District of California, Case No. CV 81-3260-CBM	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion for summary judgment on First Amendment grounds is pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
3. JEFFERSON v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., Central District of California, Case No. CV 81-3261-CBM	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion for summary judgment on First Amendment grounds is pending.
4. LOCKWOOD v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., Central District of California, Case No. CV 81-3109-CBM	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion for summary judgment on First Amendment grounds is pending.
5. ROSENKJAR v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, U.S.D.C., District of Columbia, Docket No. 81-1350 (JR)	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case settled for refund of contributions to Church.

6. WOLLERSHEIM v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., L.A. Superior Court, Case No. 332-027	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case pending, no motion for summary judgment yet filed.
7. PEGGY BEAR v. CHURCH OF SCIENTOLOGY ET AL., U.S.D.C., S.D.N.Y., 81-4688 (MJL)	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion to dismiss or in the alternative for summary judgment pending.
8. DONALD BEAR v. CHURCH OF SCIENTOLOGY, ET AL., U.S.D.C., S.D.N.Y., 81-6864 (MJL)	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Motion to dismiss or in the alternative for summary judgment pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
9. VAN SCHAICK v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, U.S.D.C., District of Massachusetts, 79-2491-G	Class action by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion. Complaint further alleged commission of intentional torts against plaintiff. Complaint sought attachment of property of the defendants and appointment of a court receiver to administer the affairs of the Church.	District court denied applications for class action certification, attachment and receivership, and dismissed several counts of the complaint on non-First Amendment grounds. District court invited motion for summary judgment on First Amendment grounds. See 535 F. Supp. 1125 (1982). After defendant Church of Scientology filed motion for summary judgment on religious fraud and mind control allegations, and after said motion was argued, plaintiff's attorney withdrew such allegations. District court entered order dismissing such allegations with prejudice, never reaching ultimate First Amendment issues.

10. KECK v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, U.S.D.C., Central District of California, CV 816060R	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case settled out of court.
11. BROWN v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., District of New Jersey, Docket No. 81-435, transferred to District of Oregon, Docket No. 81-718-RE.	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case transferred to U.S.D.C., District of Oregon on motion of improper venue. Case withdrawn and settled.
12. TROY v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, Superior Court of Massachusetts, Suffolk County, Docket No. 41-073	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
13. GARRITANO, ET AL. v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Suffolk County, Case No. 40906	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.
14. HANSEN v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Suffolk County, Case No. 41073	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.
15. VASHEL v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Suffolk County, Case No. 47237	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.

16. SMITH v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Suffolk County, Case No. 47236	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.
17. BAPTISTA v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Middlesex County, Case No. 81-1194	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.
18. BARRON v. CHURCH OF SCIENTOLOGY OF BOSTON, Superior Court of Massachusetts, Suffolk County, Case No. 51110	Suit by former member alleging religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
19. STIFFLER v. CHURCH OF SCIENTOLOGY OF BOSTON, ET AL., Superior Court of Massachusetts, Suffolk County, Case No. 44706	Action by a member of the public against a church member and proselytizer who allegedly injured the plaintiff in a scuffle following an unsuccessful proselytization attempt. Plaintiff alleges that the beliefs and practices of the defendant Church implicitly encouraged the proselytizer to engage in the tortious conduct. There are no allegations that the Church had any policy which directly encouraged proselytizers to engage in fights with members of the public.	Case was consolidated with other similar cases before single judge for determination of common First Amendment issues on a motion for summary judgment. Motion is pending.

20. STERNICKI v. CHURCH OF SCIENTOLOGY OF MICHIGAN, Circuit Court for Wayne County, Michigan, Civil Action No. 78-836-974-NO.	Suit by former member alleging religious fraud, exercise of mind control, and brainwashing. Plaintiff alleges that as a result of his membership in the Church, he terminated psychotherapy, lost self control, and therefore shot another person in an argument. His alleged damages are his liability arising out of the shooting.	Case was dismissed on procedural grounds, but reinstated on appeal. Case presently is pending.
21. DOUCETTE v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, Superior Court of California, Riverside County, No. 130348	Suit by former member alleging religious fraud and deceit, exercise of mind control and brainwashing. Complaint alleges that the Church is not a bona fide religion and that plaintiff was induced by indoctrination techniques to make donations to the Church.	Case was dismissed on August 6, 1980 for non-constitutional reasons.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
22. GUZMAN v. CHURCH OF SCIENTOLOGY MISSON OF DAVIS, ET AL., Superior Court of California, Sacramento County, Case No. 271727	Suit by former member alleging religious fraud and deceit, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was dismissed on non-constitutional grounds on December 11, 1978.
23. BURDEN v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., U.S.D.C., Middle District of Florida, Docket No. 80-501 Civ.	Suit by former member alleging religious fraud and deceit, exercise of mind control and brainwashing.	Motions to dismiss complaint on First Amendment grounds denied. Court suggested that First Amendment issues be raised on a motion for summary judgment. Such motion has not yet been filed.
24. KEITH ARMSTRONG v. CHURCH OF SCIENTOLOGY MISSON OF DENVER, District Court for the City of Denver, Colorado, C-66179	Suit by former member alleging religious fraud and deceit, exercise of mind control and brainwashing. No allegations of physical coercion.	Case was dismissed on non-constitutional grounds on February 5, 1982.

25. GERALD ARMSTRONG v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL., Superior Court of California, L.A. County, Case No. C 420153	Suit by former member alleging religious fraud and deceit, exercise of mind control and brainwashing. No allegations of physical coercion.	Court granted demurrer on non-constitutional grounds on October 27, 1982 but granted leave to amend the complaint.

II. CASES AGAINST THE UNIFICATION CHURCH

1. SCHUPPIN v. UNIFICATION CHURCH, U.S.D.C., D. Vt.; Civil Action No. 76-87	Suit by parents on their own behalf and on behalf of their daughter, alleging mind control, fraudulent inducement, peonage, alienation of affections. No allegations of physical coercion.	Dismissed for lack of standing, and for failure to state a claim. Opinion did not reach underlying Free Exercise issues. 435 F. Supp. 603 (1977).
2. DOLE v. HOLY SPIRIT ASSN. FOR UNIFICATION OF WORLD CHRISTIANITY (HSA/UWC), Superior Court of California, Alameda County, No. 544520-8	Religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing. No allegations of physical coercion.	Court has denied efforts to take deposition of Reverend Sun Myung Moon, spiritual leader of the Church. Motions to dismiss pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
3. MOLKO & LEAL v. HSA/UWC, ET AL., Superior Court of California, County of San Francisco, No. 769529	Religious fraud and deceit, intentional infliction of emotional distress, exercise of mind control and brainwashing.	Court has denied efforts to take deposition of Reverend Sun Myung Moon, spiritual leader of the Church. Motions to dismiss pending.
4. DOMINIQUE v. HSA, ET AL., Superior Court of Massachusetts, No. 81-3724	Negligence action against the Unification Church and a member for the member's negligent operation of a motor vehicle, causing death. Complaint alleges liability against the Church because it indoctrinated the member and exercised dominion and control over his mind, which proximately caused the accident.	Pending

5. HAYES v. UNIFICATION CHURCH, ET AL., Court of County Pleas, Franklin County, Ohio, 79 Civ. 02-829	Suit against Church and religious proselytizer for intentional tort growing out of a fist fight between proselytizer and member of public. Plaintiff alleged that Church indoctrinated member and exercised dominion and control over his mind, causing him to resort to violence when solicitations were denied. No allegations that Church directly authorized or directed such attacks, or of physical coercion over members.	Church motion to dismiss or for summary judgment on First Amendment and respondeat superior grounds denied. Case scheduled for trial in 1983.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
6. MERONI v. HSA/UWC, Supreme Court of New York; County of Westchester, Index No. 3811/80	Case brought by father of suicide victim for wrongful death and personal injury. Deceased committed suicide approximately forty days after attending a three-day seminar with Unification Church. No other Church involvement. Complaint alleges mind control, brainwashing. No allegations of physical coercion.	Pending
7. MILLMAN v. HSA, ET AL., Supreme Court of California, Alameda County, Case No. 506009-3	Claim of alienation of affections by father whose son joined church and still remains a member. Allegations of religious fraud, brainwashing, mind control.	Motion to dismiss denied. Case was scheduled to go to trial, but is postponed pending appellate review of procedural matters.

8. EDEN v. HSA, ET AL., Circuit Court for Wayne County, Michigan, No. 77-76736880-NO, 1977	Suit by former member for religious fraud, mind control, brainwashing. No allegation of physical coercion.	Deposition of Reverend Moon had been approved by Court. On December 3, 1982, Court dismissed the action on First Amendment and other grounds.
9. LEWIS v. HSA, ET AL., U.S.D.C., District of Massachusetts, Civil Action No. 82-310-5, 1982	Suit by former member for fraud, mind control, and breach of contract for not fulfilling promises of Church to "provide" for the plaintiff's spiritual well-being. Plaintiff suffered mental illness after leaving church, and alleges that as an element of damages. No allegations of physical coercion or mistreatment.	Motions to dismiss pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
III. CASES AGAINST THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS		
1. EISENBERG v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, Court of Common Pleas, Philadelphia County, PA.; Civil Action No. 6173, August Term 1981	Action against 26 Krishna Consciousness Temples for conspiracy to commit religious fraud and deceit, false imprisonment and outrageous conduct. Plaintiffs allege misrepresentations to plaintiffs as to the consequences of becoming a devotee of what plaintiffs allege to be "pseudo religious organization[s]", and use of indoctrination, mind control and brainwashing techniques. No allegations of physical coercion.	Cases pending. Demurrers have been filed, but no judicial action.

2. COY, ET AL. v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, Court of Common Pleas, Philadelphia County, PA.; Civil Action No. 5063, June Term 1982	Action against 26 Krishna Consciousness Temples for conspiracy to commit religious fraud and deceit, false imprisonment and outrageous conduct. Plaintiffs allege misrepresentations to plaintiffs as to the consequences of becoming a devotee of what plaintiffs allege to be "pseudo religious organization[s]", and use of indoctrination, mind control and brainwashing techniques. No allegations of physical coercion.	Cases pending. Demurrers have been filed, but no judicial action.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
3. CAMERON, ET AL. v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, Court of Common Pleas, Philadelphia County, PA.; Civil Action No. 3931, August Term 1982	Action against 26 Krishna Consciousness Temples for conspiracy to commit religious fraud and deceit, false imprisonment and outrageous conduct. Plaintiffs allege misrepresentations to plaintiffs as to the consequences of becoming a devotee of what plaintiffs allege to be "pseudo religious organization[s]", and use of indoctrination, mind control and brainwashing techniques. No allegations of physical coercion.	Cases pending. Demurrers have been filed, but no judicial action.

IV. CASES AGAINST THE SYNANON CHURCH

1. KOHL v. SYNANON CHURCH, Superior Court of California, County of Los Angeles, Case No. WEC 55516	Fraud, brainwashing and mind control in inducing plaintiff to become a member and in exercising "dominion" over him.	Action is dismissed.
2. COHEN v. SYNANON FOUNDATION, INC., Superior Court of California, County of Los Angeles, Case No. WEC 62637	Action for intentional infliction of emotional distress, breach of contract, wrongful eviction. Plaintiffs allege that defendants engaged in brainwashing and coercive persuasion, fraudulently induced plaintiffs to join, and improperly forced plaintiffs to leave the organization.	Action still pending.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
3. TOLCHIN v. SYNANON FOUNDATION, Superior Court of California, Los Angeles County, No. C 178,669	Action for intentional infliction of emotional distress, breach of contract, wrongful expulsion. Plaintiffs, former residents of Synanon, allege brainwashing, and coercive persuasion, and that they were improperly forced to leave in violation of promises made.	On June 28, 1982, the Court dismissed the action on First Amendment grounds. The Court recognized Synanon as a religion, held that the dispute was non-justiciable in that it was between a religious organization and a former member on matters concerning religious belief, practice and policy.
V. MISCELLANEOUS CASES AGAINST OTHER CHURCHES		
1. KATZ v. DIVINE LIGHT MISSION, Circuit Court for the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 79-14105	Action by former member and her parents alleging religious fraud, mind control, brainwashing, and intentional infliction of emotional distress deriving from non-coercive religious practices, such as "excessive meditation." No allegations of physical coercion.	Motion to dismiss on First Amendment grounds denied. Trial is scheduled for January 1983.

2. BOSTICK v. DITTMAN, ET AL., Circuit Court of the Sixth Judicial Circuit for Pinellas County, Florida, Case No. 82-1365-11	Action by church member against Priest, Bishop, and the Apostolic Delegate of the Vatican, for theological malpractice, coercive persuasion, fraud and deceit. Plaintiff alleged priest had fraudulently induced and coerced her, by indoctrination, into an illicit sexual relationship. Compensatory and punitive damages were sought against the Bishop and Apostolic Delegate on the basis of respondeat superior, for negligence in permitting the priest to hold his position, and for failure to properly discipline the priest.	Action dismissed on non-constitutional grounds on June 22, 1982.

Name of Case, Court & Docket Number	*Nature of Allegations*	*Judicial Action*
3. NALLY & NALLY v. GRACE COMMUNITY CHURCH, Superior Court of California, Burbank County, No. NCC-18668-B	Action by parents of former member of church who committed suicide. Plaintiffs allege that the church leader persuaded the deceased to forego psychiatric care in favor of spiritual counselling, failed to provide sufficient counselling and care, and improperly persuaded him to leave the Catholic faith and become a member of the faith of the defendant Church.	Action was dismissed by Court, without opinion, on October 27, 1981.

Office-Supreme Court, U.S.
FILED
JAN 26 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHURCH OF SCIENTOLOGY MISSION OF DAVIS
and MARTIN SAMUELS,

Petitioners,

-v.-

JULIE CHRISTOFFERSON,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

MOTION TO FILE AMICUS CURIAE BRIEF PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT

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MOTION

Churches for Fairness, an ad hoc group of religious organizations and ministers, moves under Rules 36 and 42 of this Court to file the accompanying Brief of Amicus Curiae.

In support hereof, Amicus represents that counsel for the Petitioner, Church of Scientology, Mission of Davis, has consented but that counsel for Respondent, Julie Christofferson, has not.

As noted in the "Interest of Amicus Curiae" section of the accompanying brief, the Christofferson case raises issues vitally important to the well-being of organized religions in general and Amicus in particular.

Petitioners' Jurisdictional Statement and Brief was received by Respondent on December 17, 1982 and, therefore, this motion to file

Brief of Amicus Curiae is filed within the time allowed by Rules 28 and 36 of this Court.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, JOEL KREINER, a member of the bar of this Court hereby certify that all parties required to be served with this MOTION TO FILE BRIEF OF AMICUS CURIAE have been served by mail pursuant to Rule 28(3) of the Rules of this Court. The parties to be served are:

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I further certify that on January 18. 1983, I served the foregoing MOTION TO FILE BRIEF OF AMICUS CURIAE on the attorneys listed above, by mailing to said attorneys three true and correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorneys at their regular office addresses listed above and deposited in the post office at Los Angeles, California on said day. Between said post office and the address to which said copies were mailed, there is a regular communication by U. S. Mail.

DATED: January 18, 1983.

JOEL KREINER
Counsel for Amicus Curiae

Office-Supreme Court, U.S.
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JAN 26 1983
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CLERK

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BRIEF OF AMICUS CURIAE CHURCHES FOR FAIRNESS

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MEMBERSHIP OF AMICUS CURIAE

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TABLE OF AUTHORITIES

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TO THE COURT OF APPEALS
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BRIEF OF AMICUS CURIAE
CHURCHES FOR FAIRNESS

I.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Churches For Fairness, is an ad-hoc group of recognized and organized

religious entities and ministers that is deeply concerned about the viability of religious fund-raising, counseling, and services in a suit-happy society. In recent years, organized religions have become the victims of lawsuits alleging "brainwashing", "therapeutic malpractice", and "fraud" over matters involving religious dogma and practice. The case of Christofferson v. Church of Scientology, 57 Or App 203, 644 P2d 577 (1982) is but an example of this trend.

Organized religions today basically are at a loss to know how to protect themselves from such litigation because the ground rules are yet to be written. Is a church liable because its minister tells a battered wife that her place is with her husband and that she is to remain at home even if her husband is physically violent towards her? Does the answer to this question depend upon whether the advice given is in accordance with, or

contrary to, church dogma? Is a church liable for fraud if, in a fund-raising campaign, one of its volunteer workers falsely tells donors that the funds will be used to buy baseball equipment for impoverished teenagers, instead of stating the true purpose of purchasing the minister an automobile for official use? Does liability change if the donor is, or is not, a church member? What happens when, as in Christofferson, a church member enrolls in known religious courses in order to improve her life and, when she begins to doubt whether the course is in fact religious, a minister allegedly tells her the course is "scientific" and personally guarantees that her life will improve? Is the church liable for fraud if the member's life does not improve? If so, why? Are the members also liable? Who pays the judgment? Why doesn't the Constitutional protection of Freedom of Religion prevent lawuits against a church unless the church

itself directly authorized, participated in, or subsequently approved the conduct complained of?

These questions are of concern to all the religious bodies represented by Churches For Fairness. The Christofferson case presents an opportunity for the United States Supreme Court to not only establish national constitutional guidelines for answering those questions, it also presents an opportunity for this Court to firmly declare that organized religion cannot be crushed by the weight of a suit-happy society, and is civily responsible only for its own conduct. The participants in Churches For Fairness are listed on the forepages of this brief.

II.

SUMMARY OF ARGUMENT

1. Fund-raising by a church is, in fact, a necessary religious activity;

2. Civil judges and juries have no

authority to contradict a church's official statement that one of its ministers undertook a church activity with a religious purpose;

3. Liability should not be imposed upon a religious organization for the misrepresentations of its ministers unless the organization on the whole directed, ratified, or participated in the misrepresentation.

III.

ARGUMENT

In the recent case of Christofferson v. Church of Scientology a member of a recognized religion who made donations in return for Church study courses and religious services received a jury verdict of $900,000 in punitive[1] damages against the Church. The award was given because a minister supposedly told the member, when she began to doubt the

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[1] Punitive damages are awarded to punish wrongdoers, and have no relationship to any actual loss. Gertz v Robert Welch, Inc., 418 US 323, 350 (1976).

usefulness of the services, that the courses and services weren't really religious, but were scientific, and that it was a scientific fact that her life would be improved if she completed the course work. When the member's life did not improve as much as she wanted, she sued the Church and its top administrative officer for civil fraud. The minister who allegedly told her that the services were not religious but scientific was not sued at all.

The Church and its top officer appealed, and the jury award was set aside by the Oregon Court of Appeals. However, the judges sent the case back for a second trial, saying that it was up to the jury to decide whether the courses and services were "offered for a wholly secular purpose", such as "solely to obtain money" from the church member. If so, the Church and its top officer could be sued and held responsible even if the minister had wrongfully denied that his church's services

were religious.

It is the position of Amicus that the Oregon ruling is clearly wrong and contrary to the First Amendment of the United States Constitution for three reasons. First, fund-raising is a necessity of life for any organized religion and is not, therefore, simply a "secular purpose". Second, neither civil judges nor civil juries have any business nor power to decide with what purpose church activity is carried on. The internal workings of a religious body is the legal concern of only that body. Third, if a minister commits a civil fraud or other wrong perhaps he can be sued, but the church itself and its members should not be held liable for his wrongdoing unless the church or membership authorized his conduct, participated in his conduct, or later ratified his conduct with knowledge of the harm he has done. The church should not be held responsible for damages

caused by a minister acting contrary to church policy, or by some other conduct, simply because the minister is an agent or employee of the church.

Fund-raising. Almost all religions would collapse if they did not raise funds. In 1943 the United States Supreme Court recognized that "a religious organization needs funds to remain a going concern" and that if solicitation of funds deprived religious groups of their First Amendment protection, then freedom of religion would be available only "to those who can pay their own way." Murdock v. Pennsylvania, 319 US 105, 111 (1943). Any contention by the Oregon Court, then, that fund-raising is "wholly secular" and not protected by Freedom of Religion is simply wrong. If a church is to be liable in damages for accepting a donation for its services, there must be some basis other than the mere fact the money is accepted.

Internal Church Matters. If a civil judge or jury is allowed to decide whether or not a church activity was done with a religious purpose, then that judge or jury is empowered to impose his or its notions of what is or should be religious on someone else. That should not be allowed under our Constitution.

> "Neither the courts nor the administrative agencies of the state or its subdivisions may go behind the declared content of religious beliefs anymore than they may examine their validity . . . . It is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is." Holy Spirit Association v. Tax Commission of the City of New York, 55 NYS2d 512 (1982).

Therefore, if the official leadership of a church says that funds were raised and utilized for a religious purpose, no civil judge or jury should be able to say that the funds were raised or utilized for a secular purpose. To give such power to a civil court is to give it power to enforce conformity in

religious structure and activity. Such power is clearly forbidden by the Establishment Clause of the First Amendment. No law can be used to "establish" a particular form or type of religion, or to require diverse religions to conform to a norm.

Church Responsibility for the Conduct of a Minister. Everyone is getting sued these days, including the clergy. Ministers have been sued for giving poor advice to parishioners who seek comfort from their daily troubles. The Oregon case is but a variant on a theme, and is very dangerous to the viability of organized religion. There, the church and its top officer, not the wrongdoing minister, were sued and assessed a $900,000 punitive damage award even though there was no evidence that they authorized, participated in, or ratified his supposed false statement to the church member. In other words, just because the minister was working on behalf of

the church, the church was held responsible for all his conduct. Surely, however, the minister was acting contrary to the policy of the church in question. No church denies the religiosity of its own services. There is no justice in punishing innocent church members for the wrongs of someone who is acting contrary to church policy. No such liability is imposed in the civil rights area, and it should not be imposed in the religious freedom area. See, e.g., NAACP v. Clairborne Hardware Co., ____ US ____, 102 S. Ct. 3409 (1982); Healy v. James, 408 US 169 (1972); United Mine Workers of America v. Coronado Coal Co., 259 US 344 (1922). Rather, a church, like former Mayor Rizzo of Philadelphia, like New York City, and like the UMW should be liable for a wrong of its ministers only if the wrong was done "pusuant to official. . .policy" or if "a concerted design" by the church "existed to accomplish a wrongful objective." Rizzo v.

Goode, 423 US 362 (1976); Monell v. Deppartment of Social Services of City of New York, 436 US 658 (1978), UMW of America v. Coronado Coal Co., supra.

The Oregon Court unfortunately strayed from these principles and imposed liability on a church based on a theory lawyers call "enterprise liability". That theory reasons that as between an innocent injured person and an innocent profit-making business enterprise whose employee caused the injury, the law will require the business, and not the injured person, to bear the cost regardless of whether the employee was really carrying out his duties at the time he caused the injury. The courts have reasoned that profit-making enterprises can spread the risk of such injuries by factoring such monetary costs into the prices charged for goods and services; and, secondly, imposing liability on the enterprise for virtually all conduct of its

employees will force the enterprise to carefully select its employees and closely control and supervise their performance. See, Restatement (2d) Agency, Sec. 257, 258, 262.

The enterprise liability theory is appropriate in this country for profit-making concerns, but should be confined to such concerns. It has no place in the realm of religion. Civil courts cannot, under the First Amendment, seek to "control" religion in the sense of creating or enforcing internal rules, procedures, or checks. NRLB v. Catholic Bishop of Chicago, 440 US 490 (1979); Kedroff v. St. Nicholas Cathedral, 344 US 94 (1952); Watson v. Jones, 13 Wall. (80 US) 666 (1872). Further, churches simply are not "profit" makers engaged in an enterprise through which profits and losses may be allocated. Even those churches with ample financial resources utilize them not for profit, as that term is understood in this country, or for

distributing dividends to their members, but for service to God. Consequently, the theory used by the Oregon Court to impose liability on a religious organization does not fit the situation and, indeed, conflicts with the First Amendment.

IV.

CONCLUSION

The United States Supreme Court should review the Christofferson decision in order to set national guidelines protecting churches and congregations from the unauthorized misdeeds of their errant clergy. Otherwise, organized religion as we know it today will lose respect and will consequently be in jeopardy of fiscal bankruptcy.

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CERTIFICATE OF SERVICE

I, JOEL KREINER, a member of the bar of this Court hereby certify that all parties required to be served with this BRIEF OF AMICUS CURIAE have been served by mail pursuant to Rule 28(3) of the Rules of this Court. The parties to be served are:

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I further certify that on January 18, 1983, I served the foregoing BRIEF OF AMICUS CURIAE on the attorneys listed above, by mailing to said attorneys three true and correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorneys at their regular office addresses listed above and deposited in the post office at Los Angeles, California on said day. Between said post office and the address to which said copies were mailed, there is a regular communication by U. S. Mail.

DATED: January 18, 1983.

JOEL KREINER
Counsel for Amicus Curiae